Supreme Court, U.S.
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No. 06-450

In The

Supreme Court of the United States

JOSEPH E. PUERTAS,

Petitioner,

v.

WILLIAM OVERTON, Director, Michigan Department of Corrections, NICK LUDWICK, Warden, Egeler Reception & Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County, Michigan,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Sixth Circuit Court of Appeals' decision conflict with previous decisions of this Court and of the Ninth Circuit because it shifts the prosecution's obligation to disclose exculpatory and impeaching materials under *Brady v Maryland* to the defense and does it use the wrong standard to judge the materiality of the suppressed document?

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OPINIONS BELOW

The July 13, 2006 order of the Sixth Circuit Court of Appeals denying the motion for rehearing and rehearing en banc is unpublished and is reproduced in the appendix at page 118a. The April 4, 2006 2-1 opinion of the Sixth Circuit Court of Appeals is unpublished and is reproduced in the appendix at page 1a. The February 13, 2006 2-1 opinion of the Sixth Circuit Court of Appeals was not selected for publication in the Federal Reporter, but is reported at 165 FED Appx 689 (2006) and reproduced in the appendix at page 35a. The opinion of the United States District Court was not selected for publication and is reproduced in the appendix at page 69a.

The May 22, 2003 order of the Michigan Supreme Court denying leave to appeal is reported at 468 Mich 907 (2003) (Table). The October 24, 2003 order of the Michigan Supreme Court denying a motion to reconsider the decision denying leave to appeal is reported at 468 Mich 907 (2003) (Table). The September 27, 2002 opinion of the Michigan Court of Appeals reinstating the convictions was not selected for publication but is reported at 2002 WL 31160304 (Mich App). The trial court's May 8, 2000 Opinion and Order Granting a New Trial was not selected for publication and is reproduced in the appendix at page 112a.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals filed its original opinion on February 13, 2006. Pursuant to a petition for rehearing and rehearing en banc, the Court filed a revised opinion on April 4, 2006. After a supplement to the petition

for rehearing and rehearing en banc was filed, the Sixth Circuit entered an order denying petitioner's motion for rehearing and rehearing en banc on July 13, 2006. This Court has jurisdiction under 28 USC 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AMENDMENTS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . "

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The petitioner, Joseph E. Puertas, was convicted after a jury trial in state court of one count of conducting a criminal enterprise contrary to MCL 750.159(i)(1) and six counts of delivery of less than 50 grams of cocaine contrary to MCL 333.7413(2). The offenses were alleged to have occurred between August and November 18, 1997. The total amount of the cocaine from the six buys was approximately 60.94 grams. On December 2, 1999, Petitioner was sentenced on count I to 2-40 years in prison and on the other six counts to 2-20 years in prison. All sentences to be served consecutively.

At the preliminary examination, Officer Kenneth Everingha testified that he was the surveillance officer inside the vling alley for two of the buys. Before trial, Everingham admitted that he had lied at the examination and had not been present at the bowling alley.

During pre-trial proceedings, Petitioner filed a motion for additional discovery in the Oakland County Circuit Court. Petitioner alleged that additional information and investigative reports of interviews existed, but that the prosecutor's office was withholding that information from the defense. On June 10, 1998, the trial judge granted the motion and ordered the prosecution to turn over any and all interviews conducted by the prosecution or by any investigative police agency dating from the beginning of the investigation up until the time of trial, "whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies."

At trial, the prosecution relied on testimony from Joseph Sweeney, a drug-addicted informant who was paid per successful buy and on Officer Quisenberry, Sweeney's handler. Each buy was made in a bowling alley, owned by petitioner, which was open to the public. Everingham was not called to testify at trial. After the conviction but before the sentence, the Detroit Free Press obtained through FOIA a redacted copy of the Michigan State Police Public Corruption Investigation of the Puertas Investigation. Based on this report, the defense filed a post-conviction motion for discovery requesting an un-redacted copy of the report. The motion was granted and the report was disclosed to the defense. (App 119a).

The defense filed a motion for new trial based on the failure of the prosecution to disclose the report. The trial

court granted the motion. (App 112a). The prosecution appealed the decision. On September 27, 2002, the Michigan Court of Appeals reversed the trial court's order granting a new trial. On May 22, 2003, the Michigan Supreme Court denied defendant's application for leave to appeal.

On June 23, 2003, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan alleging among other issues the failure of the prosecution to disclose the Michigan State Police Public Corruption Report of the Investigation into the Puertas Investigation before trial as *Brady* material. On October 19, 2004, the Court issued a Memorandum Opinion and Order denying the request for a writ of habeas corpus. (App 69a).

Petitioner filed an appeal in the Sixth Circuit Court of Appeals. On February 13, 2006, that Court in a 2-1 decision affirmed the district court. (App 35a). Pursuant to a petition for rehearing and rehearing en banc, the Court, again 2-1, filed a revised opinion on April 4, 2006. (App 1a). After a supplement to the petition for rehearing and rehearing en banc was filed, the Sixth Circuit entered an order denying petitioner's motion for rehearing and rehearing en banc on July 13, 2006. (App 118a).

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AND OF THE NINTH CIRCUIT BECAUSE IT SHIFTS THE PROSECUTION'S OBLIGATION TO DISCLOSE EXCULPATORY AND IMPEACHING MATERIALS UNDER *BRADY V MARYLAND* TO THE DEFENSE AND IT USES THE WRONG STANDARD TO JUDGE THE MATERIALITY OF THE SUPPRESSED DOCUMENT.

In order to establish a *Brady* violation, a defendant must demonstrate that 1) the evidence at issue was favorable to the accused either because it is exculpatory or because it is impeaching; 2) that the evidence was suppressed by the state either wilfully or inadvertently; and 3) the defendant was prejudiced. *Strickler v Greene*, 527 US 263, 281-282 (1999). In this case, in a 2-1 decision, the majority of the panel of the Sixth Circuit stated that it was deciding this case based only on the third factor of the *Brady* test. However, as pointed out in the dissent, it actually conflated the second factor, that of suppression, with the third factor. (App 24a, 31a-32a). Consequently both factors are addressed here.

A. The prosecution's duty to disclose exculpatory and impeaching evidence to the defense is not relieved simply because the defense has an opportunity to depose witnesses at a civil forfeiture hearing.

The Sixth Circuit Court of Appeals' decision conflicts with a triumvirate of United States Supreme Court cases. In *United States v Bagley*, 473 US 667 (1985), this Court

held that a defendant did not have to make a specific request for *Brady* materials. In *Banks v Dretke*, 540 US 668, 695 (2004), this Court rejected a rule that a prosecutor may hide evidence and a defendant must seek it because such a rule "is not tenable in a system constitutionally bound to accord a defendant due process." It noted that once the prosecution responds to a request with an empty hand, the defense is under no obligation to engage in further investigation to determine whether the prosecution in fact withheld evidence. *Id* at 695. In *Strickler v Greene*, 527 US 263, 284 (1999), this Court held that a defendant may rely on representations that public officials have properly discharged their official duties. Along with *Brady v Maryland*, 373 US 83 (1963), these three cases are the pillars upon which a criminal defendant's constitutional right to discover exculpatory and impeaching material rests.

In Petitioner's case, despite the fact that a specific request is no longer required for the *Brady* obligation to be activated, the defense brought a special motion asking for additional discovery. The entered order directed the prosecution to disclose "any and all statements of interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial . . . whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies." Pursuant to that order and despite the fact that the duty of disclosure is a continuing duty, no further documents were turned over to the defense. Nor was this order challenged by way of a prosecutorial appeal.

In the three months before the start of petitioner's trial, a public corruption investigation examined the police investigation that led to the filing of the charges against

Petitioner. The impetus for the investigation was the admission by Deputy Ken Everingham that he lied at petitioner's preliminary examination when he testified that he was the surveillance officer for two of the alleged controlled buys. The actual buys were allegedly made by a drug-addicted, paid-per-buy informant named Joseph Sweeney. Deputy Ken Quisenberry was the officer who "handled" Sweeney.

To a certain extent, the investigation was secret. Defense counsel suspected that Everingham was telling not only on himself but on other officers. The progress of the investigation was certainly secret. When the investigation was completed, there was no announcement, nor were the results of the report voluntarily released to the public. The fact that the investigation was completed and had even generated a report only came to light because the Detroit Free Press filed an FOIA request. Unfortunately, that request was not filled until after the verdict in this case was reached. Even then, the report that was turned over to the Free Press was a redacted one.

After the defense received a copy of the report from the newspaper, it filed a post-conviction motion for an unredacted copy. The prosecution, upon being ordered to do so, turned over a copy to the defense. (App 119a-183a). Before the Detroit Free Press obtained the report, the defense was unaware that the investigation had completed its task and that it had produced a report. Based on the last page of the report, the investigation, it appears, had ended approximately two weeks before the start of petitioner's trial. (App 183a).

The judges in the majority in the Sixth Circuit Court of Appeals found that the state appellate court could have

reasonably concluded that petitioner knew the substance of the report or knew enough to have discovered the information based on further inquiry. This finding, that defendant was on notice as to the information and so should have secured it without relying on the prosecution, conflicts with the holdings in *Banks v Dretke*, 540 US 668 (2004) and in *Strickler v Greene*, 527 US 263 (1999). It places a duty on the defense which it did not formerly have and thereby decreases the prosecution's obligation under *Brady* of turning over favorable material to the defense.

The *Bagley* Court discussed the two-fold effect on the defense in a specific request situation such as that found here where the government fails to respond. First, the defense is denied evidence. Second, this misrepresentation that the evidence does not exist may cause the defense to abandon a line of investigation that it might otherwise pursue. *United States v Bagley*, 473 US at 683. Not only did the defense in the instant case make a specific request, but the failure of the state to respond to the request misled the defense into thinking that there were no more reports to obtain.

The defense did not act improperly in assuming that the prosecution had complied with its *Brady* obligation. *Strickler v Greene*, *supra* at 284. *Strickler* also rejected the theory that defense counsel was not diligent because he could have obtained a court order where it was unclear whether reports existed pertaining to numerous interviews or that reports had been suppressed. *Id* at 285; *Banks v Dretke*, 540 US 668, 694 (2004) (A defendant can assume that prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction). Here, the defense was misled into thinking that there were no more reports to obtain and it presumed

that the prosecution complied with its *Brady* obligation. This Court in *Banks v Dretke* made it clear that a defendant does not have to do more.

In this instance, the defense acted reasonably in pursuit of exculpatory information where before trial, counsel filed a document entitled "Motion for Additional Discovery." The defense alleged in the motion that law enforcement officials were continuing to take written statements but that these statements were not being turned over to the defense. On June 10, 1998, an order was entered granting the disclosure of

> Any and all statements of interviews conducted by the prosecution and/or any investigating agency from the beginning of the investigation until trial, shall be turned over forthwith, whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies.

(Appendix to Petitioner's Brief in the Sixth Circuit; 112-113).[1] Pursuant to that order and despite the fact that the duty of disclosure is a continuing duty, nothing was turned over to the defense.[2]

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[1] Standard practice is either that the prosecutor's office voluntarily turns over discovery pursuant to court rule or request, or the defense makes a motion for discovery. Here standard discovery had been completed and the defense took an extra step requesting more discovery and being more specific.

[2] While the Michigan Court of Appeals suggested that the defense should have served a subpoena, it is hard to believe that the prosecution would have obeyed a subpoena signed by a defense attorney when it would not obey an order signed by the court.

The Sixth Circuit also held that the defense should have used civil avenues of discovery. (App 44a-45a). As was pointed out in the Petition for Rehearing filed in the Sixth Circuit, Michigan rules of civil discovery do not apply to criminal prosecutions. MCR 6.001(D)(3) states " . . . Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter." There is no rule of discovery comparable to FRCrP 15(a)(1) in the State of Michigan. While the Court removed all reference to FRCrP 15(a)(1) in its April 4, 2006 opinion, it still held that the defense should have availed itself of the opportunity presented by the civil forfeiture proceeding. (App 11a).

However a forfeiture proceeding or the availability of any civil discovery method does not alleviate the prosecution of its *Brady* obligation. That obligation is in place because of the special status of the prosecution in criminal trials. It is a representative of the sovereign and is therefore expected to rule impartially. *Strickler*, *supra* at 281. Moreover, if the prosecution is going to ignore a direct order from the trial court to disclose additional reports, why would the defense, or the Sixth Circuit for that matter, expect it to voluntarily comply with civil discovery?

While trial counsel in a newspaper article indicated some awareness of an investigation, that does not relieve the prosecution of its *Brady* obligations, nor does it mean that the defense is put on notice that reports exist. See *Strickler v Greene*, 527 US at 284-285 where the court rejected the argument that defense counsel must have been aware of other statements given to the police by a witness because she mentioned being interviewed by them in a letter to the editor published in a local newspaper.

The Court pointed out that while it was true that the attorneys must have known that multiple interviews had been conducted, it did not then follow that they would know that a record of the interview had been made and then suppressed.

The Ninth Circuit in *Benn v Lambert*, 283 F3d 1040 (9th Cir, 1002), held that a defendant furnished with inculpatory evidence by the state is not required to assume that the state has concealed material information and has thereby obligated him to ascertain the *Brady* material on his own. In *Paradis v Arave*, 130 F3d 385 (9th Cir, 1997), the Circuit held that the defendant's knowledge and ability to interview the prosecution's expert and obtain the undisclosed material did not affect its *Brady* analysis.

The Sixth Circuit's decision erred in placing a discovery burden on defense greater than that of due diligence and in requiring the defense to resort to civil discovery procedures to obtain exculpatory and impeaching material. It directly conflicts not only with the Court's opinions but also with the Ninth Circuit's decisions which do not relieve the state of its *Brady* obligation despite the availability to the defense of alternative means of discovering the material.

B. The Petitioner was prejudiced by the suppression of this evidence.

The Sixth Circuit Court of Appeals' decision also conflicts with this Court's decision in *Kyles v Whitley*, 514 US 419 (1995) regarding the third prong of the *Brady* test, that of materiality. The test is whether there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different. *United States v Bagley*, *supra* 682. Justice Souter, in his opinion concurring with and dissenting from the majority in *Strickler* cautioned that the term reasonable probability was misleading and that the term "significant possibility" was a more accurate reflection of the applicable standard:

> Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "**more likely than not**." While any short phrases for what the cases are getting at will be "inevitably imprecise," *United States v Agurs*, 427 US 97, 108 (1976), I think "significant possibility" would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence. (Emphasis added).

Strickler v Greene, *supra* at 298. He also stressed that in the end the touchstone of materiality is whether confidence in the verdict had been undermined.

This Court in *Kyles* emphasized four points in deciding whether materiality had been shown. First, materiality does not require a showing by a preponderance of the evidence.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles, 514 US at 433-434. Second, this is not a sufficiency of the evidence test. This means that even if the evidence,

including the suppressed evidence, is sufficient to support the conviction, a *Brady* claim may still be maintained as long as the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id* at 435. What is critical is the lack of confidence in the verdict, not the ability of the evidence to support it.

Third, a harmless error analysis is inapplicable. *Id* at 436.

Fourth, the suppressed evidence must be analyzed collectively rather than item by item. *Id* at 437.

In this case, the Majority found that the defense would not have gained additional help from the report. (App 14a). It noted that the state Court of Appeals found that the report presented a possibility of a different result rather than a probability. (App 5a). It also referred to the fact that Sweeney, the informant, had been ably impeached.

But whether the evidence would have been of additional help to the defendant is not the test for materiality. Petitioner contends that in using this standard, the Majority resorted to a sufficiency of the evidence analysis or the "more likely than not" test that Justice Souter warned against. The Majority should have considered both the suppressed evidence along with the evidence offered at trial to decide whether confidence in the verdict had been undermined. This Court's prior decisions compelled an affirmative response from the Sixth Circuit panel.

The majority's analysis also erred in discounting the significance of the contents of the report not just for its impeachment value in regard to Sweeney but also for its

impeachment value in regard to Quisenberry and also for its substantive exculpatory evidence. Without the report, the defense did not know that Lt. Kuyck and Commander Menghini of the Sheriff's Department really had voiced their concerns about the investigation in a private meeting. While Everingham, the officer who had recanted his testimony, alluded to them at the forfeiture hearing, he was hardly a credible person. Had the defense access to the report which memorialized these command officers' trepidations, it would have called them to testify. Lt. Kuyck reported that he was uncomfortable because he had known the informant for sometime and believed he had no credibility. Further he would have concerns where this informant was used to make a buy and no undercover officer was present. (App 147a). Menghini thought Quisenberry ran a sloppy investigation. (App 135a). According to Everingham, Menghini was so adamant about these issues, that he stated at the meeting that he wasn't going to send an innocent man to prison. (App 142a).

Kuyck and Menghini were both high-ranking officers whose experience and knowledge would have impressed the jury. These witnesses could have been used at trial by the defense as experts to explain for instance how a controlled buy is properly controlled and why an informant with all of Sweeney's baggage was not to be trusted. Here, the buys allegedly took place in a bowling alley. The alley was open to the public well before Officer Quisenberry arrived on the scene with Sweeney giving Sweeney ample time to plant cocaine in the bowling alley before he had to go and meet Quisenberry to be searched to insure that he had no cocaine on him. No surveillance officer on any of the six buys ever saw Sweeney actually receive the drugs from Petitioner or the co-defendant. (TT

10/22/99 Quisenberry 162-164). Kuyck's reluctance to believe Sweeney and Menghini's disdain for Quisenberry's sloppy investigation would not only have undermined the prosecution's case, but it also would have lent credibility to the defense theory that Petitioner was set up. Their testimony concerning this botched investigation would have been decisive.

The *Kyles* Court recognized the negative effect on a prosecution where proof that the police were guilty of negligence in their investigation is offered. *Kyles v Whitley*, 514 US at 446-447.

> When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it.

Id at 446 fn 15. The Majority on the panel in the Sixth Circuit did not recognize this negative effect.

The suppressed report also offered other facts which could have been used by the defense to attack the credibility of the police witnesses and the integrity of the investigation. For instance, the suppressed report showed that Quisenberry and Sgt. Yuchasz failed to keep notes on each transaction (App 127a); that officers falsified overtime reports in an effort to support falsified surveillance reports and vice versa (App 121a, 147a); that using informants without undercover involvement was a mistake (App 135a); that some of the officers thought that judges expected them to lie so affidavits supporting search warrant requests needed to be "flowered up" to overcome this perceived judicial disbelief in search warrant affidavits

(App 177a); that Quisenberry admitted to Menghini that there was a problem with the investigation and that "some of the information within the investigation was not really the way things were observed." (App 135a).

The public corruption report also offered facts which supported the defense theory that Petitioner was framed. At trial, Sweeney testified that for the first transaction he was paid $50. For the fourth, he was paid $40. (TT 10/18/99 Sweeney 110-112, 165). Yet Quisenberry told the public corruption investigator that he paid Sweeney $150-$200 per buy. (App 127a). Quisenberry's claim that he paid the informant $100 to $150 more than Sweeney claimed he got supports the defense theory that the prosecution of Petitioner was used as a money-making scheme cooked up by Quisenberry to supplement his police pay. Once the $1.9 million was found, their was additional pressure on the police to make the case stick in order to retain that money for their Department or the County's general fund. This theory is supported by the fact that the drugs allegedly bought off of petitioner and his co-defendant were not sent to the lab for analysis until December 18, shortly after the seizure of the money. (TT 10/22/99 Quisenberry 23-26). Since the alleged buys began in August, this meant as great a delay as four-months in obtaining the analysis. The report also records that Menghini mentioned to the public corruption investigators that the investigation became a tangled mess after this money was found because no drugs were found with it despite the execution of 12 search warrants. (App 137a). The money was ultimately returned to the Puertas family in the forfeiture proceedings.

Moreover, the fact of the investigation also supported the defense theory that Petitioner was framed. Even

though the report ultimately concluded that Everingham's allegations were unfounded, it does not diminish the importance of the fact of an investigation in a setting where the defense only has to raise a reasonable doubt to obtain an acquittal. The investigation was by no means independent. It was conducted by the Michigan State Police and at the time of the investigation, local law enforcement agencies worked in teams which were supervised by the Michigan State Police. Only misconduct by Everingham, rather than his allegations of misconduct by others, was seriously investigated. This is vividly highlighted in the report which shows that only Everingham was asked to take a polygraph but when he suggested they polygraph Sweeney, he was ignored. (App 142a).

At trial, the only evidence offered to convict petitioner was the uncorroborated testimony from the drug-addicted, pay-per-buy informant Sweeney that he received drugs from petitioner, the testimony of the incompetent Quisenberry concerning the sloppy procedures he used to guarantee the integrity of the buys, and a dog alert on the seized money. Had the suppressed evidence been available at trial, the defense case would have been markedly stronger and the prosecution's weak case would have been weakened further. The existence of a public corruption investigation and the contents of the report it produced were material under *Brady*. When this trial evidence is analyzed along with the suppressed evidence, the case is put in a completely different light and this Court's confidence in the verdict should be undermined. The evidence was material and there was a reasonable probability of a different outcome had the evidence been disclose to the defense.

The state appellate court's opinion was contrary to the holdings in *Kyles*, *Strickler*, *Bagley*, and *Banks*, and their progeny. The Majority's opinion in the Sixth Circuit Court of Appeals conflicts with the above identified decisions of this Court and of the Ninth Circuit, and it sets the dangerous precedent of decreasing the prosecution's *Brady* obligation and replacing it with a defense obligation recognized by no United States Supreme Court case. This Court should grant the writ of certiorari because if this opinion is allowed to stand, it will erode the due process rights of the accused.

CONCLUSION

This Court should grant this petition for a writ of certiorari and reverse the decision of the Sixth Circuit.

Respectfully submitted,

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Dated: September 27, 2006

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-2405

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH EDMUND PUERTAS, Petitioner-Appellant v. WILLIAM OVERTON, Director, Michigan Department of Corrections, NICK LUDWICK, Warden, Egeler Reception and Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County, Respondents-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (Filed Apr. 4, 2006)

Before: MERRITT, MOORE and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. In this habeas action, Joseph Puertas challenges his Michigan state-court convictions for one count of operating a criminal enterprise and six counts of delivering less than 50 grams of cocaine. The district court denied the petition. Because the resolution of Puertas's constitutional claims by the state courts was not contrary to, and did not amount to an unreasonable application of, Supreme Court precedent, we affirm.

I

In 1997, when police suspected Puertas of selling drugs from his Oakland County, Michigan bowling alley, the Megabowl, they hired an informant to confirm their suspicions. Working with the Michigan State Police, members of the Oakland County Sheriff's Department hired Joseph Sweeney to purchase cocaine from Puertas at the bowling alley.

At Puertas's state-court trial, police and Sweeney testified that between August 19 and November 18, 1997, Sweeney completed six controlled buys of cocaine from Puertas or his co-defendant. Before each buy, the officers searched Sweeney to ensure that he did not possess any drugs and watched him during his encounters with Puertas. After the sixth buy, police executed search warrants for 12 locations associated with Puertas. Although the investigators involved in these coordinated searches did not seize any drugs, two drug-detecting dogs alerted to nine different safes owned by Puertas. Officers and experts testified at trial that the dogs were most likely alerting to a lingering odor from drugs that recently had been removed from the safes. The officers also recovered $1.9 million in cash and property during the searches. Based on this evidence, the jury convicted Puertas of operating a criminal enterprise and of selling cocaine.

Puertas appealed to the Michigan court of appeals. While that appeal was pending, he obtained a copy of a state police report investigating allegations of public corruption stemming from, among other law-enforcement activity, the police investigation of him. The report details interviews with officers involved in the Puertas investigation and other law-enforcement agents who had contact

with those officers. It concludes that the allegations of public corruption in connection with the Puertas investigation were unfounded. Although not all of the information in the report directly concerns Puertas, parts of it concern the credibility of some of the participants in the Puertas investigation and parts of it contain statements from several of the witnesses in his case. Ruling that the prosecution had a duty to give Puertas the report before or during trial, the trial court set aside Puertas's conviction and granted him a new trial.

On appeal, the Michigan court of appeals reversed the decision to grant a new trial and affirmed Puertas's convictions. *People v. Puertas,* Nos. 224173, 224286, 2002 WL 31160304 (Mich. Ct. App. Sept. 27, 2002). The Michigan Supreme Court denied Puertas's motion for leave to appeal, *People v. Puertas,* 661 N.W.2d 583 (Mich. 2003).

On June 23, 2003, Puertas filed this habeas petition. The district court denied the petition but granted a certificate of appealability on all issues. *Puertas v. Overton,* 342 F. Supp. 2d 649 (ED. Mich. 2004).

II.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), we may grant a habeas petition if the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor,* 529 U.S. 362, 405 (2000). If "a claim has not been adjudicated on the merits in State court proceedings and has not been procedurally defaulted, we look at the claim de novo rather than

through the deferential lens of AEDPA." *Hill v. Mitchell,* 400 F.3d 308, 313 (6th Cir. 2005) (internal quotation marks and citation omitted).

A.

Puertas first argues that the prosecution violated its duty under the Due Process Clause and *Brady v. Maryland,* 373 U.S. 83 (1963), when it failed to provide him with the state police report. To demonstrate a *Brady* violation, (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). "There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir. 1998) (internal quotation marks omitted).

The Michigan court of appeals held that Puertas satisfied the first element of a *Brady* claim because the state police report had impeachment value. *Puertas,* 2002 WL 31160304, at *2 ("[T]he report may fairly be characterized as having impeachment value to the defense as it relates to the credibility of some of the key players in the Megabowl investigation."). No one disputes that conclusion. As to the second element of a *Brady* claim, the Michigan court of appeals held that the prosecution did not "suppress" the report because it did not have it. "[T]he

prosecutor," the court held, does not have "a duty to learn of all evidence favorable to the defense known to anyone in the course of government work." *Id.* at *5. Rather, the prosecutor's duty is "limited to learning of all evidence favorable to the defense known by government actors *working on the same case.*" *Id.* Because the state police investigation did not take place on behalf of the Oakland County prosecutor, the court held that "it is unreasonable to impute to the prosecutor or the Sheriffs Department possession of the work product resulting from the State Police's public corruption investigation." *Id.* As to the third element of a *Brady* claim, the court concluded that Puertas and his co-defendant "failed to demonstrate that they exercised reasonable diligence to obtain" the report, *id.*, and concluded that "[h]ad the complete report rested in the defense's possession all along, a different result might be considered a possibility, but not a 'reasonable probability,'" as case law requires, *id.* at 5 n.8.

Because the state court's rejection of Puertas' s arguments under the third prong of the *Brady* test does not unreasonably apply controlling Supreme Court precedent; we shall address only that aspect of the state court of appeals' decision and shall affirm the district court's decision on that ground alone. In particular, a state court could reasonably conclude that Puertas either knew the substance of the report's contents or knew enough to have discovered that information based upon further inquiry. Approximately four months before Puertas's October 1999 trial, local media reported that the Michigan State Police had commenced a public-corruption investigation. *See* JA 371-75 (June 18, 1999 *Oakland Press* and *Detroit Free Press* articles). The newspapers reported admissions by a former deputy of the Oakland County Sheriffs Department,

Kenneth Everingham, that he had lied at Puertas's preliminary examination (about conducting surveillance during some of the controlled buys). *Id.* Everingham also alleged that Sergeant Kenneth Quisenberry, who led the Puertas investigation, had fabricated portions of his reports. *Id.* The 11-week public-corruption investigation closed and produced the report at issue on September 23, 1999, approximately 2 weeks before the first day of Puertas's trial. Puertas has failed to explain why public knowledge of the investigation and his own attorney's knowledge of this conspicuously pertinent investigation, *see* JA 372 (June 18, 1999 *Oakland Press* article quoting Puertas's attorney's comments on the allegations), did not at a minimum provide him with inquiry notice to seek through pre-trial depositions and other discovery all of the information contained in the report. *See Spirko v. Mitchell,* 368 F.3d 603, 610-11 (6th Cir. 2004) (rejecting *Brady* claim where defendant was "on notice" that evidence existed and "[a] reasonable defendant would have pursued that inquiry"); *United States v. Corrado,* 227 F.3d 528, 538 (6th Cir. 2000) (rejecting a *Brady* claim where the defendant "has made no showing that he would have been unable to identify, locate, and interview these individuals through reasonable efforts on his own part").

Attempting to counter this conclusion, Puertas raises the following arguments. He first points to the report's value in attacking the testimony of the informant, Sweeney, the prosecution's lead witness. With the benefit of the report, he claims, "he would have called additional police witnesses to comment on" Sweeney's "lack of credibility." Puertas Br. at 30. Although Puertas does not specify whom he would have called or which portions of the report would have prompted this action, statements by

two officers in the report concern Sweeney's credibility. Everingham stated that he "personally did not believe that [Sweeney] was reliable enough to work this type of investigation." JA 136-e. And Lieutenant Bill Kuyck stated that "he was uncomfortable because he has known [Sweeney] for some time and believes that [he] has no credibility." JA 138. In addition to claiming that he would have called additional witnesses (presumably Everingham and Kuyck) had he been given the report, Puertas submits that the report would have made him "aware," Puertas Br. at 30, that during Sweeney's interview with the investigating officer, Sweeney stated that "he was agreeable to anything that . . . Quisenberry or Deputy Gary Miller wanted to undertake." JA 141.

Even without having the summaries of the interviews contained in the report in hand before trial, the defense vigorously attacked Sweeney's credibility at trial, exploring and attempting to exploit these precise lines of impeachment. Sweeney admitted that he was addicted to drugs and alcohol and that he had been convicted of two felonies involving dishonesty. *Puertas,* 342 F. Supp. 2d at 659. He testified that he told the police that he would do "whatever it took" to alleviate the charges against his brother and that neither he nor his brother was ultimately prosecuted for their involvement in drug crimes. *Id.* On cross-examination, Sweeney admitted that he had trouble with his memory, that he became an informant for the money and that he bought drugs for personal use after conducting buys for the police. *Id.* Because Sweeney's deposition, preliminary examination and trial testimony all indicated that he would do "whatever it took" to mitigate the charges against his brother, *see* Sweeney Dep. at 237 (June 30, 1998) ("I just told them I would like to get

[my brother] off the hook, whatever it took."); Prelim. Exam. Tr. at 53 (Dec. 29, 1997) ("I just told them that . . . whatever it took, I'd help 'em relieve my brother of a criminal record."); JA 492 (trial testimony: "I just told the police officers I would do whatever it took" "[t]o alleviate the charges" against "[m]y brother."), and because this testimony covered the same ground as Sweeney's statement in the report that he was "agreeable to anything" Quisenberry or Miller wanted, the state court did not unreasonably reject this theory of prejudice. *See Spirko,* 368 F.3d at 610 ("[W]here the defendant was aware of the essential facts that would enable him to take advantage of the exculpatory evidence, the government's failure to disclose it did not violate *Brady.*") (internal quotation marks omitted).

Nor was Puertas prejudiced by not having access to Everingham's and Kuyck's statements in the report, as he had ample opportunities to elicit this information himself before trial. Not only could Puertas have sought to depose these potential government witnesses prior to his criminal trial, but he in fact did depose Everingham in connection with a government-initiated civil-forfeiture action that arose from the criminal investigation. During this deposition, which occurred four months before his criminal trial, and two days before the first newspaper articles about the investigation, Everingham stated that he had "concerns" about the Puertas investigation and stated that he had discussed the investigation with Kuyck. *See* Everingham Dep. at 14 (June 16, 1999); *id.* at 90-91. With this deposition testimony in hand, plus the information later reported by local newspapers about Everingham's allegations, plus Puertas's attorney's knowledge of the state investigation, Puertas not only knew that Everingham had "concerns"

about the investigation but also had ample opportunity to develop further support for this theory before trial had he wished.

Puertas separately claims that the report would have made him "aware" that Sweeney "had made a contrary statement as to who identified [Puertas] as a suspect." Puertas Br. at 30. According to the report, Sweeney said that the "decision to investigate" Puertas and his bowling alley "was Deputy Miller's idea." JA 141. But at trial Sweeney testified that he first discussed investigating Puertas with Quisenberry, not Miller, although when pressed he stated that he could not remember if any other officer participated in that conversation. *See* Trial Tr. at 65-66 (Oct. 19, 1999).

In view of the many other ways in which the defense attacked Sweeney's credibility, the advantage that Puertas could have gained by contrasting Sweeney's statement at trial (that Quisenberry first identified Puertas as a suspect) with the statement in the report (that the decision to investigate Puertas was "Miller's idea") arises only at the margins. Additional testimony from police witnesses questioning Sweeney's credibility would have been cumulative and accordingly of slight value. *See Byrd v. Collins*, 209 F.3d 486, 518-19 (6th Cir. 2000). The following cross-examination of Sweeney at trial, at any rate, suggests that the defense already had some knowledge of this statement:

> Q Yesterday, you testified that you had a discussion about going into the Megabowl, right?
>
> A Um hm. Yes.
>
> Q The discussion you said was with Quizenberry [sic] alone, correct?

A Correct.

Q Miller was there, correct?

A I don't remember if he was or not. . . .

Q You might have given a different answer at a different time?

A I don't know. I mean I don't remember.

Trial Tr. at 65 (Oct. 19, 1999).

Puertas next claims that he could have used information in the report to attack the credibility of Quisenberry's testimony in three ways. First, he "would have known, and offered as evidence," Puertas Br. at 30, information in the report that one of the commanders of the investigation, Mark Menghini, said that Quisenberry "conducted a sloppy investigation and cut too many corners" and believed that Sweeney "was not very good and all the purchases were conducted by the informant with no undercover involvement," JA 136-a. Second, Puertas says that Quisenberry's statement in the report that "he did not keep dailies or notes on each transaction" amounted to new evidence.

JA 133. Third, while Sweeney testified at trial "that he was paid $50 for the first transaction and $40 for the fourth," Puertas Br. at 31, the report notes that Quisenberry said that Sweeney's payment "would range from $150 to $200 each time" he completed a controlled buy from Puertas, JA 133. This discrepancy, Puertas suggests, shows that Quisenberry might have "ke[pt] the extra $100 or $150 on those two occasions" and that he "was using a phony drug investigation in order to supplement his pay." Puertas Br. at 31-32.

Here too, however, Puertas already knew this information or knew enough about the topic to obtain more. information through civil discovery in his forfeiture action. In his forfeiture deposition, Everingham also stated that Menghini had expressed concerns about the case and about Sweeney. In view of this testimony, Puertas had knowledge of Menghini's concerns. And had he wished to obtain additional information about those concerns, he could have interviewed Menghini about Quisenberry, and that is particularly so in view of Everingham's deposition statement that Menghini "stood up and stated that in his 20 some years of service, he's never sent an innocent man to prison and he wasn't about to start with this one." Everingham Dep. at 15-16 (June 16, 1999). The trial transcript also belies Puertas's claim that he did not know that Quisenberry failed to keep notes on each transaction. *See* Trial Tr. at 243 (Oct. 28, 1999) (during closing argument, Puertas's attorney stated that Quisenberry said, "I'm not going to take one note, okay? Not one note. . . . I'm never going to take a note as to what happened, unless there's a deal"). And as to any discrepancy between Sweeney's and Quisenberry's statements regarding Sweeney's compensation, Puertas has not explained why he could not have covered this pertinent topic in a pre-trial deposition of Quisenberry or Sweeney, or during trial. Nor has he explained why this $100 to $150 discrepancy in pay does not at most reflect a confluence of Sweeney's admittedly poor memory and Quisenberry's poor record-keeping.

Puertas next argues that he would have challenged the search warrants in the case had he known about Deputy Gary McClure's statement in the report that when he first started working for the Narcotics Enforcement Team, Miller told him "to add information to the search

warrants to flower them up" and "reportedly told [him] that judges expect police officers to lie." JA 151. But, in truth, Puertas deposed McClure prior to his trial, and these allegations surfaced at that time. *See* McClure Dep. at 32-35 (July 1, 1998) (To strengthen the case for probable cause, "on more than one occasion [Miller] . . . would tell me specifically to put in [affidavits supporting search warrants] that. there was short-term traffic . . . observed at a residence that I was . . . investigating . . . [when] I never did any surveillance. . . . And he said, 'Put it in anyways. It's all right. They expect that, the judges expect that. That's not a problem.'"). The defense then relied on these allegations while cross-examining Miller during trial. *See* Trial Tr. at 103 (Oct. 14, 1999) ("Q: And there . . . have been accusations that you committed perjury by a former narcotics enforcement team officer, too. Is that correct?").

Puertas, finally, complains that he was prevented from "interview[ing] and call[ing] witnesses who corroborated that overtime reports had been falsified in order to corroborate false surveillance reports." Puertas Br. at 30. Here, again, the record shows that Puertas knew about these allegations before trial. *See* Everingham Dep. at 18-22 (June 16, 1999) (describing when Quisenberry would tell him to fill out overtime slips for times he had not worked to create the appearance that he had been present conducting surveillance on the Puertas investigation). And during trial, Puertas's attorney raised the allegations when he cross-examined Quisenberry, *see* Trial Tr. at 212-15 (Oct. 22, 1999) (asking Quisenberry about Everingham's allegations), and mentioned them during his closing argument, *see* Trial Tr. at 245 (Oct. 28, 1999) ("Mr. Everingham accuses Mr. Quisenberry . . . on a couple of occasions . . . [of telling] them to fill out over time slips [to

make it appear as though] he was there on the surveillance.").

Our colleague raises an additional point that deserves consideration. As she sees it, Puertas was nonetheless prejudiced because "the Report itself, apart from its contents, has independent significance." Dissent at 6. But Puertas has not made this argument. Perhaps because the report itself *rejects* the allegations of police misconduct, Puertas premises his *Brady* prejudice claim not on the report's existence but on the contents of the report, namely the statements and interviews in it that we have discussed above.

But even if Puertas had made this argument, the logic behind the position is not self-evident – that because the Michigan police "conducted an official investigation from which a Report resulted," "the allegations had some amount of credibility and gravity" even if the report ultimately rejected the allegations. *Id.* at 3. No evidence indicates what degree of "credibility and gravity" is needed to prompt the Michigan state police department to commence an "official investigation" (or whether the suggested distinction between "a general investigation" and "the official investigation," *id.* at 2, exists). And surely Puertas had sufficient information to develop *this* evidence, as his attorney knew about the investigation. Why Puertas chose to focus on the contents of the report rather than what it takes to start an official investigation is not in the record. But it hardly seems unusual that the defense would choose a strategy that focused not on the existence of an investigation (which determined that there was no police misconduct) but on the contents of the interviews contained in the report. Indeed, without the report in hand, Puertas was free to present Everingham's allegations to

the jury, but the jury never learned that the investigation into these allegations concluded that they were unfounded.

No less importantly, no Supreme Court authority supports this theory. *See* 28 U.S.C. § 2254(d)(1). The only case mentioned by the dissent, *Strickler,* involved documents that contained new, valuable information for the defense. *See* 527 U.S. at 266 ("The exculpatory material that petitioner claims should have been disclosed before trial includes documents prepared by [a prosecution witness], and notes of interviews with her, that impeach significant portions of her testimony."); *id.* at 273 (Because the "notes taken by [the detective] during his interviews with [the witness], and letters written by [the witness] to [the detective]" "cast serious doubt on [the witnesses's] confident assertion of her 'exceptionally good memory' " in her trial testimony, "the *content* of the documents is critical.") (emphasis added); *id.* at 273-75 & nn.8-10 (describing the content of the suppressed materials and identifying the information that the defense did not have at trial and that conflicted with the witness's trial testimony and otherwise cast doubt on her credibility). And *Strickler* did not involve a witness that the defense had already deposed. *See id.* at 285 n.27 (noting that the witness "refused to speak with defense counsel before trial"). Puertas, by contrast, did not stand to gain any additional help from the contents of the report. In the absence of Supreme Court authority supporting such a theory, this AEDPA claim necessarily fails.

B.

Puertas separately contends that the state court of appeals unreasonably applied Supreme Court precedent in

denying his prosecutorial-misconduct claim. To prove prosecutorial misconduct, Puertas must show that the challenged remarks infected his trial with such unfairness that his resulting conviction was a denial of due process. *See Byrd*, 209 F.3d at 529. "To constitute a denial of due process, the misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (internal quotation marks omitted).

Puertas first claims that the prosecutor improperly argued facts not in evidence when he suggested that Puertas had planted a bag of harmless white powder that officers discovered in one of Puertas's safes and that he did so as "a dig from that man who knew [the police] were coming." JA 624. The next day, Puertas moved for a mistrial based in part on this statement, arguing that it improperly implied that Puertas was a drug dealer and had been tipped off about the search. The trial court ruled the statement was not "grounds for a mistrial" and noted that "[t]he jury is instructed that if the attorneys argue something that isn't in evidence, they can't consider it." JA 643, Even "[a]ssuming that this reference to [Puertas's] motive for placing the powder in the safe was an unreasonable and improper inference drawn from the evidence," the court of appeals held that the "comment does not warrant relief because a special instruction would have cured any prejudice to defendants." *Puertas*, 2002 WL 31160304, at *14.

As an initial matter, the state court of appeals did not unreasonably apply Supreme Court precedent in holding that Puertas was not prejudiced by the comment for two reasons: first, because the court gave a general instruction at the close of evidence reminding jurors to consider only properly admitted evidence, Trial Tr. at 22 (Oct. 29, 1999);

and second, to the extent that Puertas felt such a general instruction was insufficient, he could have, but did not, request a special curative instruction to mitigate the effects of the statement. Moreover, "prosecutors must be given leeway to argue reasonable inferences from the evidence," *Byrd*, 209 F.3d at 535 (internal quotation marks omitted), and the evidence supported the inferences that the prosecutor drew. Evidence in the record established: that Puertas sold cocaine to Sweeney; that drug-detecting dogs alerted to the safes owned by Puertas; that during the searches of nine safes and other property owned by Puertas, $1.9 million in cash and property was found; and that the day manager of the bowling alley testified that she never saw white powder in the safe and that she kept her white exercise supplement (the suspected source of the bag of harmless white powder) in a desk drawer, not in the safe.

Puertas next claims that the prosecutor violated his Fifth (and Fourteenth) Amendment right not to take the stand by commenting on his silence. *See Griffin v. California*, 380 U.S. 609, 615 n.5 (1965). After closing arguments, in the midst of an exchange between the attorneys concerning a defense objection, Puertas blurted out "He's done it from the start. They lied – ." JA 627. The prosecutor apparently then asked Puertas's attorney "something along the lines of is Mr. Puertas going to testify[?]" JA 641. The court reporter did not transcribe this comment and Puertas's attorney says he did not hear it. But his attorney claimed that someone from the audience heard the comment and brought it to his attention later that day. Puertas then moved for a mistrial, claiming that the comment was audible on a tape of the proceedings and that the jury must have heard it.

The trial court denied the motion, expressing doubt that the jury ever heard the comment and noting that the jury instructions properly explained Puertas's constitutional right to remain silent. The state court of appeals agreed, reasoning that the admission by Puertas's counsel that he did not hear the statement supported the trial court's conclusion that the jury likely did not hear it either. "In any event," it noted, "we assume as we must that the jury instructions remedied the error to the extent one or more jurors heard the comment." *Puertas*, 2002 WL 31160304, at *14.

The state courts did not unreasonably apply Supreme Court precedent in reaching this conclusion. Both before and after this comment allegedly was made, the trial court instructed the jurors that they may not draw negative inferences from Puertas's failure to testify. Even if the jury did hear the comment, which seems unlikely in view of the trial court's ring-side observations of the incident, the instructions properly mitigated any risk that the statement would affect the jury's verdict. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

Puertas next claims that the prosecutor improperly denigrated the defense when, in his closing, he said that the defense presented a case made up of "haze and smoke" and tried to distract the jury with "sound and fury," "bombastic antics" and "smoke and haze and innuendo and insinuation," accusing the defense of presenting evidence "designed to distract you from the truth in this case." Puertas Br. at 42-43. While prosecutors may not make "unfounded and inflammatory attacks on the opposing advocate," *United States v. Young*, 470 U.S. 1, 9 (1985), the Michigan court of appeals noted that "[n]one of these prosecutorial comments drew any defense objections" and

held that Puertas had forfeited this claim, *Puertas*, 2002 WL 31160304, at *14.

Having failed to object to the comments during trial, Puertas violated Michigan's rule that defendants must preserve their claims for appellate review by raising them in the trial court and thus has procedurally defaulted the claim. *Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000) ("[If] a habeas petitioner fails to obtain consideration of a claim by a state court . . . due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review."). Puertas never argues that this is not a consistently enforced procedural-default rule, but he does ask us to excuse his default and to view the failure to object as a strategic decision designed to avoid drawing attention to the prosecutor's remarks. But we may excuse a petitioner's procedural default only if he meets the exacting cause-and-prejudice standard or demonstrates that a fundamental miscarriage of justice will occur if we fail to consider the federal claim. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). Because defense counsel could have objected to these comments outside of the jury's presence (eliminating the strategic dilemma) and because a timely cautionary instruction presumably would have been effective, *see Marsh*, 481 U.S. at 211, Puertas has not established cause for his failure to object. And because Puertas has not submitted any new and reliable evidence of actual innocence, he has not shown a miscarriage of justice. *Willis v. Smith*, 351 F.3d 741, 746 (6th Cir. 2003).

Puertas next argues that the prosecution made an improper civic-duty argument when it said the following during its closing argument:

> After this case is done and then you are able to go home and talk to your loved ones about what the case was about or your neighbors or whoever it is and you get there and you're in your backyard and you're leaning over the fence and you're talking to your neighbor and you say, yep, I just got done with this jury duty and we had this very interesting case. It was a drug case and a racketeering case and a conspiracy case and the Prosecutor had the actual person who bought the drugs from the two defendants and he had officers who actually witnesse[d] the transactions happen and they had $106,000 – .

JA 626.

Generally speaking, a prosecutor has a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Viereck v. United States,* 318 U.S. 236, 248 (1943). But "[u]nless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible". *United States v. Emuegbunam,* 268 F.3d 377, 406 (6th Cir. 2001). Because the Michigan court of appeals did not discuss this claim when Puertas raised it there, we review the claim de novo. Like the district court, we agree that these less-than-pointed remarks appealed "more to the jury's common sense than to the jury's fear of community safety" and did not rise to the level of remarks designed to incite prejudice in a jury. *Puertas,* 342 F. Supp. 2d at 666. Any prejudice, moreover, was cured when the trial court sustained Puertas's objection to the comments and instructed the jury not to consider them in reaching its verdict. *See Marsh,* 481 U.S. at 211.

C.

Puertas also objects to the trial court's failure to instruct the jury about missing evidence. Prior to trial, Puertas requested copies of affidavits prepared in support of search warrants involving controlled buys by Sweeney in an unrelated investigation before he began working on the Puertas investigation. When the prosecution was unable to locate the affidavits, Puertas asked the trial court "for some kind of instruction to the jury" on the missing affidavits. JA 516. Although the trial court denied Puertas's request, it told Puertas he could "argue about it to the jury." JA 612.

A state-law challenge to an allegedly defective jury instruction faces a stiff burden. The claimant must show that the flawed instructions "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). In reviewing this claim, the Michigan court of appeals noted that in light of the generality of Puertas's request (for "some kind of instruction"), the trial court "acted within its discretion in declining to give an undefined jury charge regarding the prosecutor's inability to produce affidavits from unrelated cases that are sought only for impeachment purposes." *Puertas*, 2002 WL 31160304, at *12.

The court of appeals did not unreasonably apply *Naughten* in reaching this conclusion. Because the missing evidence was at most tenuously connected to the case and because Puertas had ample opportunities to cross-examine Sweeney and the police about Sweeney's credibility, the state appellate court could reasonably conclude that the trial court's refusal to give the requested instruction did not deprive Puertas of a fair trial.

D.

Puertas, lastly, claims that the trial court improperly admitted evidence about the dog sniffs, claiming that the evidence had little or no probative value and was highly prejudicial. He also objects that the court rejected his request for a cautionary instruction about this evidence.

During the searches of Puertas's property, two drug-detecting dogs alerted to nine safes that contained a substantial amount of U.S. currency but did not contain illegal drugs. At trial, two forensic experts and two canine patrol officers testified about the training of the dogs and explained that the dogs' alerts indicated that narcotics recently must have been inside the safes. The trial court rejected Puertas's objection to this evidence and denied his request for a special limiting instruction to the effect that the drug-sniffing-dog evidence has little value as proof and that he could not be convicted on the basis of this evidence alone.

A trial court's error in applying state evidentiary law does "not rise to the level of [a] federal constitutional claim[] warranting relief in a habeas action unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment." *McAdoo v. Elo,* 365 F.3d 487, 494 (6th Cir. 2004). The Michigan court of appeals held that the trial court did not abuse its discretion in admitting the evidence and concluded that any risk of prejudice from the evidence did not substantially outweigh its probative value.

In attacking this ruling, Puertas argues that a considerable amount of United States currency contains residue from controlled substances and that many recent court decisions acknowledge this fact. At trial, however, the

government's experts testified that a properly trained dog will not alert to the residue found on currency in general circulation. The experts explained that drug-detecting dogs are not trained to alert simply to cocaine but to the odor of methyl benzoate, which dissipates after two hours, making it unlikely that a dog would alert to the odor of the drug on currency unless that currency recently had been in the presence of cocaine.

The high degree of deference we accord state evidentiary decisions means that a claimant generally will not be able to question "rulings regarding the admission or exclusion of evidence . . . in a federal habeas corpus proceeding." *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988). Because Puertas had the opportunity to question the reliability of this evidence at trial and because the challenged testimony addressed the reliability concerns that he raised, the state court of appeals' resolution of this claim does not entitle Puertas to habeas relief.

Much the same holds true for Puertas's argument that the trial court at a minimum should have granted his request for a cautionary instruction about the evidence. Again, we may not grant the writ simply because a jury instruction allegedly was incorrect under state law, *Estelle v. McGuire,* 502 U.S. 62, 71-72 (1991), and in this instance "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law," *Henderson v. Kibbe,* 431 U.S. 145, 155 (1977).

While the state court of appeals concluded that the trial court should have given this instruction, it concluded that the omission did not warrant a new trial because it did not result in a miscarriage of justice. In view of the jury instructions that were given, the court reasoned, the

jury had no basis for relying on the dog-sniff evidence alone to convict Puertas, and this evidence merely corroborated the "very powerful evidence" of six controlled buys of illegal narcotics. *See Puertas,* 2002 WL 31160304, at *11 ("An essential element to the charge of delivering cocaine is evidence of the intent to deliver. This evidence was established through the evidence of narcotic sales at the Megabowl, as demonstrated by the controlled buys executed by Sweeney. Likewise, the crime of operating a criminal enterprise is not established merely by evidence of possession of illegal narcotics and large amounts of cash. Rather, the prosecution was required to prove that [Puertas was] employed or associated with the Megabowl and knowingly participated in the affairs of the Megabowl through a 'pattern of racketeering activity' as that term is defined by Mich. Comp. Laws § 750.159f(c). This pattern of racketeering activity was established by the evidence of multiple sales of narcotics from behind the business counter of the Megabowl.") (footnote omitted). The state court of appeals did not unreasonably apply Supreme Court precedent in reaching this conclusion.

III.

For these reasons, we affirm.

KAREN NELSON MOORE, Circuit Judge, dissenting. This case addresses the prosecution's outrageous failure to turn over to the defendant, Joseph Puertas, a report, completed weeks before trial, detailing an official investigation made by the State Police of allegations of local police misconduct in their investigation of Puertas. The prosecution's withholding of such vital information,

which goes to the legitimacy of the state's case against Puertas, cannot be justified here. The majority denies Joseph Puertas habeas relief on his claim of state suppression of evidence under *Brady v. Maryland,* 373 U.S. 83 (1963), because it concludes that the Michigan Court of Appeals did not unreasonably apply Supreme Court precedent in deciding that Puertas failed to show prejudice, the third element of a *Brady* claim.[1] Because I believe that the Michigan Court of Appeals unreasonably determined that Puertas has not satisfied the second and third elements of *Brady,* I respectfully dissent.

The majority agrees with the conclusion of the Michigan Court of Appeals that Puertas "failed to demonstrate that [he] exercised reasonable diligence to obtain the Michigan State Police public corruption investigative report," in particular because there was media coverage about the investigation of Oakland County Deputy Sheriff Kenneth Everingham's allegations of police misconduct.[2] *People v. Puertas,* No. 224173, 2002 WL 31160304, at *5

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[1] A successful *Brady* claim must satisfy the following three elements: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999).

[2] Although the majority classifies this aspect of the *Brady* analysis – whether a defendant could have independently accessed the information contained in the *Brady* material – as part of the third element's prejudice inquiry, it is better viewed as part of the inquiry under *Brady*'s second element – whether the prosecution suppressed the evidence. The prosecution can only suppress evidence that is "wholly within [its] control," and thus if a defendant knew enough to have taken advantage of the evidence or could have accessed the evidence from another source, it is the second element of *Brady* that has not been met. *See Coe v. Bell,* 161 F.3d 320, 344 (6th Cir. 1998).

(Mich. Ct. App. Sept. 27, 2002). Specifically, the majority concludes that Puertas either had knowledge of the contents of the Michigan State Police investigative report ("Report"), which memorialized the results of the investigation of Everingham's allegations, or that he had sufficient knowledge to have found the information contained therein with additional efforts. Majority Opinion ("Maj. Op.") at 5.

The conclusion on this point by both the majority and the Michigan Court of Appeals erroneously conflates several separate elements relating to Everingham's accusations of misconduct – the accusations themselves, a general investigation into the accusations, the official investigation done by the Michigan State Police, information that happened to be in the Report, and the fact that the Report existed and that particular information was contained in the Report – each of which has independent significance. Comments by Puertas's trial attorney reported in The Oakland Free Press indicate that Puertas knew about some of the allegations of police misconduct related to the investigation of Puertas. However, even if it could be shown that Puertas knew of the allegations and of some investigation into the allegations, it does not follow that he knew about the official investigation conducted by the Michigan State Police and that a Report containing the results was produced.[3]

[3] The article quoting Puertas's trial attorney was published on June 18, 1999. *See* Stephen W. Huber, *Ex-Deputy Says He Lied About Seeing Drug Sale,* The Oakland Press, June 18, 1999, at A-1, A-12. That article indicates that Puertas knew about some of Everingham's allegations. Although this article and another later-published article mention an investigation into the allegations, and thus Puertas could be charged with knowledge of an investigation, *see id.*; L.L. Brasier,

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Independent knowledge of some of the information that happened to be contained in the Report is not the equivalent, for *Brady* purposes, of knowledge that a Report was issued and that certain claims could be substantiated by the Report. The fact that the Michigan State Police conducted an official investigation from which a Report resulted indicates that the allegations had some amount of credibility and gravity. Although Puertas knew about some of the information included in the Report, that an official investigation was conducted and a Report was issued lends credence to the possibility that Puertas was set up and that the charges against him were entirely fabricated. Puertas's knowledge of some of the contents of the Report, including problems with the credibility of the informant Joseph Sweeney, discrepancies in testimony, and irregularities related to his own investigation that are documented in the Report, and his reliance on this information at trial, is not dispositive of whether Puertas was prejudiced by not having access to the Report. Substantiating these suggestions regarding shortcomings in the investigation of Puertas with the official Report by the Michigan State Police would have lent them much greater weight with the jury, and thus the prosecution's failure to disclose the Report was prejudicial. *See Strickler v. Greene*, 527 U.S. 263, 284-85 & n.26 (1999) (distinguishing between the fact that interviews had occurred and the contents of those interviews, on the one hand, and that

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Oakland Drug Case Tests Police Claims on $5 Million, Detroit Free Press, Oct. 8, 1999, at 1B, it is not clear from the record when the Michigan State Police began its official investigation. Moreover, as discussed at greater length in the main text, knowledge of the investigation is not equivalent to knowledge of the resulting Report for *Brady* purposes.

documents relating to these interviews had been produced, on the other).

The majority agrees with the conclusion of the Michigan Court of Appeals that Puertas had sufficient knowledge to have accessed the Report through "reasonable diligence" because local media articles reported on Everingham's allegations and the resulting police investigation. Maj. Op. at 5-6; *Puertas,* 2002 WL 31160304, at *5. However, in the context of an analysis of whether cause had been shown to overcome procedural default, the Supreme Court rejected this same inferential leap. *See Strickler,* 527 U.S. at 284-85. The Court held that "a letter published in a local newspaper" containing statements from a witness that made it clear that she had been interviewed several times by a particular detective was insufficient to alert the defendant to the existence and suppression of records relating to those interviews. *Id.*

In this case, although the investigation and Report were completed on September 23, 1999, the Report itself came to light only after Puertas's conviction, when, pursuant to requests made under the Freedom of Information Act, 5 U.S.C. § 552, a newspaper obtained copies of the Report and made them available to the defense. This belies the contention of the Michigan Court of Appeals that the Report would have been available to Puertas were it pursued with "reasonable diligence." *Puertas,* 2002 WL 31160304, at *5. Moreover, Puertas *did* in fact make a motion for additional discovery, which was granted on June 10, 1998. Puertas should not have been expected to "scavenge for hints of undisclosed *Brady* material," *Banks v. Dretke,* 540 U.S. 668, 694-95 (2004), because he reasonably relied on the discovery order, which directed the prosecution to turn over to Puertas "[a]ny and all statements of

interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial . . . whether in the possession of the Oakland County Prosecutor's Office or *any of the police investigating agencies.*" Joint Appendix at 113 (Order Granting Motion for Additional Discovery) (emphasis added).

The Supreme Court has repeatedly held that a defendant can reasonably rely on the prosecution's representation that it has disclosed all *Brady* evidence, and that once the prosecution confirms this representation, the defendant is under no further duty to investigate additional *Brady* materials. *See Banks,* 540 U.S. at 692-94 (acknowledging reasonable reliance on the state's assertion that it would disclose all *Brady* material); *Strickler,* 527 U.S. at 289 (recognizing reasonable reliance on the prosecution's open-file policy). Like the defendants' reasonable reliance on the assertion in *Banks* and the open-file policy in *Strickler,* Puertas reasonably relied on the state trial court's order that the prosecution turn over to him materials like the Report in question. That the prosecution was under this continuing obligation by order of the court to disclose such materials confirmed Puertas's reasonable reliance, thereby relieving him of the responsibility of inquiring about additional *Brady* materials. *Cf. Banks,* 540 U.S. at 694 ("[I]t was . . . appropriate for [the defendant] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction."); *Strickler,* 527 U.S. at 286 (noting "[t]he presumption, well established by tradition and experience, that prosecutors have fully discharged their official duties" (quotations omitted)). Puertas had no reason to suspect that a Report had been issued, and, even

if he did, he would have reasonably relied on the prosecution to comply with the court order to turn over such materials. *See Banks,* 540 U.S. at 693-94; *Strickler,* 527 U.S. at 285-88.

Given that knowledge of the Report does not flow from knowledge of the allegations and the investigation, that Puertas did not neglect to act with "reasonable diligence" in failing to discover the Report, and that the fact of the Report itself, apart from its contents, has independent significance in terms of prejudice, the majority's explanations regarding what Puertas either knew or should have known about the contents of the Report are insufficient to refute the materiality of the Report. We review the conclusion of the Michigan Court of Appeals that the Report was not material, a mixed question of law and fact, to assess whether it was an "unreasonable application" of the Supreme Court's governing standard on materiality – whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Kyles v. Whitley,* 514 U.S. 419, 433 (1995). *See* 28 U.S.C. § 2254(d)(1); *Joshua v. DeWitt,* 341 F.3d 430, 436 (6th Cir. 2003); *Lancaster v. Adams,* 324 F.3d 423, 429 (6th Cir. 2003). The reasonable – probability standard is met "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles,* 514 U.S. at 434 (quoting *United States v. Bagley,* 473 U.S. 667, 678 (1985)).

As discussed earlier, although Puertas may have raised a variety of impeaching and exculpatory information at trial that was contained in the report, including the lack of credibility of the informant, Joseph Sweeney, and other problems with the investigation, Puertas did not, because he could not, rely on the fact that this information

was credited by an official investigation by the Michigan State Police, which would have greatly enhanced the value of this information.[4] Only if Puertas had knowledge of and access to the Report could he have presented the pertinent parts of the Report so that the impeaching evidence could be accorded the proper weight by the jury. In particular, the Report confirms inconsistencies regarding how Puertas was identified as a suspect, which constitutes powerful exculpatory evidence because it supports the theory that Puertas was set up and that the charges against him were completely manufactured. It is unreasonable for the Michigan Court of Appeals to fail to acknowledge that the Report by the Michigan State Police (confirming the incredibility of the informant, the sloppy work of the local police, and the discrepancies in the local officers' statements) would have far greater influence than the defense attorney's mere suggestion of the same evidence.

The Michigan Court of Appeals relies heavily on the evidence in the Report that it considers unfavorable to Puertas (namely, that Everingham was an irresponsible employee with a gambling problem and that the Report ultimately found his allegations to be unfounded) to determine that Puertas was not prejudiced by the unavailability of the Report. The Michigan Court of Appeals

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[4] The majority's explanation of one discrepancy is particularly unsatisfying. Sweeney, the informant, testified at trial that on several occasions he was paid $50 to $160 less than what Sergeant Kenneth Quisenberry of the Oakland County Sheriff's Department told the Michigan State Police that Sweeney was paid for each drug transaction. The majority states that this "at most reflect[s] a confluence of Sweeney's admittedly poor memory and Quisenberry's poor record-keeping." Maj. Op. at 11. However, Puertas should have had this information available to him both for impeachment purposes and to suggest that Quisenberry's motives were tainted by financial interest.

was unreasonable in reaching this conclusion. First, the state court should have recognized that the Oakland County Sheriff's Department ("the Sheriff's Department") had motives to downplay the problems with its investigation of Puertas. In addition to a desire to preserve its integrity, the Sheriff's Department faced civil liability due to a lawsuit brought by Everingham and also stood to reap financial benefits from the Puertas case due to the forfeiture of the assets involved. *See* L.L. Brasier, *Oakland Drug Case Tests Police Claims on $5 Million,* Detroit Free Press, Oct. 8, 1999, at 1B. Second, the fact that the Report ultimately concluded that Everingham's allegations were unfounded is not highly relevant to the *Brady* prejudice analysis because the evidentiary standard used by the Michigan State Police to confirm such allegations is markedly different from the evidentiary standard required to convict Puertas. Although there may not have been sufficient evidence for the State Police to conclude that misconduct occurred, the Report could, and in fact, does, raise enough suspicions regarding the investigation of Puertas to create a reasonable doubt as to his guilt. For these reasons, the suppressed evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." *See Kyles,* 514 U.S. at 435. The Michigan Court of Appeals acted unreasonably in applying the prejudice component of *Brady.*

The majority affirmed the district court's denial of Puertas's *Brady* claim on the third element and therefore found no need to discuss the other two elements.[5] Because

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[5] As explained in note two above, the majority's rejection of the claim on the ground that Puertas knew the substance of Report or knew enough to discover it through further inquiry is best understood as

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I believe, as explained above, that Puertas has satisfied *Brady*'s third element, I will address the first two elements. As the majority notes, there is no dispute that Puertas has satisfied the first element of his *Brady* claim because the Report has both exculpatory and impeachment value.[6] *See Strickler,* 527 U.S. at 281-82.

The Michigan Court of Appeals concluded that Puertas failed to satisfy the second element, which requires that the evidence has been suppressed by the state, *Strickler,* 527 U.S. at 282, because "possession" of the product of the Michigan State Police investigation could not be imputed to the prosecution or the Sheriff's Department, *Puertas,* 2002 WL 31160304, at *5. The district court erred in concluding that this decision was reasonable. *Puertas v. Overton,* 342 F. Supp. 2d 649, 659 (E.D. Mich. 2004).

The Supreme Court has held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles,* 514 U.S. at 437. Supreme Court precedent does not require possession to trigger the prosecutor's duty to disclose, and in fact, holds quite the opposite. In *Kyles,* the Court expressly rejected the state's argument that it had no duty to disclose materials

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falling within the second element – whether the prosecution suppressed the evidence.

[6] Puertas contends that the Michigan Court of Appeals erroneously decided that impeaching evidence is not favorable evidence under *Brady.* The district court correctly concluded that the Michigan Court [sic] Appeals recognized both the proper significance of impeaching evidence under *Brady*'s first element and that Puertas had satisfied this element of *Brady* based on the Report's impeachment value. *Puertas v. Overton,* 342 F. Supp. 2d 649, 658 (E.D. Mich. 2004).

known only to the police and not to the prosecution. 514 U.S. at 438. In dismissing this suggestion, the Court stated that "[s]ince, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id.* The Court explained that "'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" *Id.* (quoting *Giglio v. United States,* 405 U.S. 150, 154 (1972)). It is clear, then, that the Supreme Court does not require actual knowledge, much less possession, of evidence, to satisfy the second element of *Brady.* Because the Sheriff's Office repeatedly interviewed individuals from the Oakland County Prosecutor's Office ("the Prosecutor's Office") in the course of its investigation of Everingham's charges, it is equally clear that the prosecution was aware of "favorable evidence known to the others acting on the government's behalf in the case." *Kyles,* 514 U.S. at 437.

The decision of the Michigan Court of Appeals that "the investigation by the State Police was not taking place on behalf of the Oakland County Prosecutor[,]" and "may fairly be characterized as being adverse to the Oakland County Sheriff's Department," *Puertas,* 2002 WL 31160304, at *5, is unreasonable because it fundamentally misunderstands the role of the prosecutor as set forth by the Supreme Court. The prosecutor is "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice

shall be done,'" *Kyles*, 514 U.S. at 439 (alterations in the original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The Prosecutor's Office, of course, has no interest in pursuing a conviction based on fabricated charges or false evidence. Therefore, the Michigan State Police investigation, conducted with the full cooperation and involvement of the Prosecutor's Office, was conducted "on the government's behalf in the case" because it was aimed at preserving the integrity of Puertas's criminal prosecution. *See Kyles*, 514 U.S. at 437-40. The prosecution's withholding of this critical document from Puertas reveals an indefensibly narrow view of its duty to disclose.

For the foregoing reasons, the denial by the Michigan Court of Appeals of Puertas's *Brady* claim constituted an "unreasonable application of [] clearly established Federal law." 28 U.S.C. § 2254(d)(1). Therefore, I would grant Puertas's habeas petition on this basis. I respectfully dissent.

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No. 04-2405

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH EDMUND PUERTAS, Petitioner-Appellant	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
WILLIAM OVERTON, Director, Michigan Department of Corrections, NICK LUDWICK, Warden, Egeler Reception and Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County, Respondents-Appellees.	)	

Before MERRITT, MOORE and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. In this habeas action, Joseph Puertas challenges his Michigan state-court convictions for one count of operating a criminal enterprise and six counts of delivering less than 50 grams of cocaine. The district court denied the petition. Because the resolution of Puertas's constitutional claims by the state courts was not contrary to, and did not amount to an unreasonable application of, Supreme Court precedent, we affirm.

I.

In 1997, when police suspected Puertas of selling drugs from his Oakland County, Michigan bowling alley, the Megabowl, they hired an informant to confirm their suspicions. Working with the Michigan State Police, members of the Oakland County Sheriff's Department hired Joseph Sweeney to purchase cocaine from Puertas at the bowling alley.

At Puertas's state-court trial, police and Sweeney testified that between August 19 and November 18, 1997, Sweeney completed six controlled buys of cocaine from Puertas or his co-defendant. Before each buy, the officers searched Sweeney to ensure that he did not possess any drugs and watched him during his encounters with Puertas. After the sixth buy, police executed search warrants for 12 locations associated with Puertas. Although the investigators involved in these coordinated searches did not seize any drugs, two drug-detecting dogs alerted to nine different safes owned by Puertas. Officers and experts testified at trial that the dogs were most likely alerting to a lingering odor from drugs that recently had been removed from the safes. The officers also recovered $1.9 million in cash and property during the searches. Based on this evidence, the jury convicted Puertas of operating a criminal enterprise and of selling cocaine.

Puertas appealed to the Michigan court of appeals. While that appeal was pending, he obtained a copy of a state police report investigating allegations of public corruption stemming from, among other law-enforcement activity, the police investigation of him. The report details interviews with officers involved in the Puertas investigation and other law-enforcement agents who had contact

with those officers. It concludes that the allegations of public corruption in connection with the Puertas investigation were unfounded. Although not all of the information in the report directly concerns Puertas, parts of it concern the credibility of some of the participants in the Puertas investigation and parts of it contain statements from several of the witnesses in his case. Ruling that the prosecution had a duty to give Puertas the report before or during trial, the trial court set aside Puertas's conviction and granted him a new trial.

On appeal, the Michigan court of appeals reversed the decision to grant a new trial and affirmed Puertas's convictions. *People v. Puertas,* Nos. 224173, 224286, 2002 WL 31160304 (Mich. Ct. App. Sept. 27, 2002). The Michigan Supreme Court denied Puertas's motion for leave to appeal. *People v. Puertas,* 661 N.W.2d 583 (Mich. 2003).

On June 23, 2003, Puertas filed this habeas petition. The district court denied the petition but granted a certificate of appealability on all issues. *Puertas v. Overton,* 342 F. Supp. 2d 649 (E.D. Mich. 2004).

II.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), we may grant a habeas petition if the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor,* 529 U.S. 362, 405 (2000). If "a claim has not been adjudicated on the merits in State court proceedings and has not been procedurally defaulted, we look at the claim de novo rather than

through the deferential lens of AEDPA." *Hill v. Mitchell,* 400 F.3d 308, 313 (6th Cir. 2005) (internal quotation marks and citation omitted).

A.

Puertas first argues that the prosecution violated its duty under the Due Process Clause and *Brady v. Maryland,* 373 U.S. 83 (1963), when it failed to provide him with the state police report. To demonstrate a *Brady* violation, (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). "There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir. 1998) (internal quotation marks omitted).

The Michigan court of appeals held that Puertas satisfied the first element of a *Brady* claim because the state police report had impeachment value. *Puertas,* 2002 WL 31160304, at *2 ("[T]he report may fairly be characterized as having impeachment value to the defense as it relates to the credibility of some of the key players in the Megabowl investigation."). No one disputes that conclusion. As to the second element of a *Brady* claim, the Michigan court of appeals held that the prosecution did not "suppress" the report because it did not have it. "[T]he

prosecutor," the court held, does not have "a duty to learn of all evidence favorable to the defense known to anyone in the course of government work." *Id.* at *5. Rather, the prosecutor's duty is "limited to learning of all evidence favorable to the defense known by government actors *working on the same case.*" *Id.* Because the state police investigation did not take place on behalf of the Oakland County prosecutor, the court held that "it is unreasonable to impute to the prosecutor or the Sheriff's Department possession of the work product resulting from the State Police's public corruption investigation." *Id.* As to the third element of a *Brady* claim, the court concluded that Puertas and his co-defendant "failed to demonstrate that they exercised reasonable diligence to obtain" the report, *id.*, and concluded that "[h]ad the complete report rested in the defense's possession all along, a different result might be considered a possibility, but not a 'reasonable probability,'" as case law requires, *id.* at 5 n.8.

Because the state court's rejection of Puertas's arguments under the third prong of the *Brady* test does not unreasonably apply controlling Supreme Court precedent, we shall address only that aspect of the state court of appeals' decision and shall affirm the district court's decision on that ground alone. In particular, a state court could reasonably conclude that Puertas either knew the substance of the report's contents or knew enough to have discovered that information based upon further inquiry. Approximately four months before Puertas's October 1999 trial, local media reported that the Michigan State Police had commenced a public-corruption investigation. *See* JA 371-75 (June 18, 1999 *Oakland Press* and *Detroit Free Press* articles). The newspapers reported admissions by a former deputy of the Oakland County Sheriff's Department,

Kenneth Everingham, that he had lied at Puertas's preliminary examination (about conducting surveillance during some of the controlled buys). *Id.* Everingham also alleged that Sergeant Kenneth Quisenberry, who led the Puertas investigation, had fabricated portions of his reports. *Id.* The 11-week public-corruption investigation closed and produced the report at issue on September 23, 1999, approximately 2 weeks before the first day of Puertas's trial. Puertas has failed to explain why public knowledge of the investigation and his own attorney's knowledge of this conspicuously pertinent investigation, *see* JA 372 (June 18, 1999 *Oakland Press* article quoting Puertas's attorney's comments on the allegations), did not at a minimum provide him with inquiry notice to seek through pre-trial depositions and other discovery all of the information contained in the report. *See Spirko v. Mitchell,* 368 F.3d 603, 610-11 (6th Cir. 2004) (rejecting *Brady* claim where defendant was "on notice" that evidence existed and "[a] reasonable defendant would have pursued that inquiry"); *United States v. Corrado,* 227 F.3d 528, 538 (6th Cir. 2000) (rejecting a *Brady* claim where the defendant "has made no showing that he would have been unable to identify, locate, and interview these individuals through reasonable efforts on his own part").

Attempting to counter this conclusion, Puertas raises the following arguments. He first points to the report's value in attacking the testimony of the informant, Sweeney, the prosecution's lead witness. With the benefit of the report, he claims, "he would have called additional police witnesses to comment on" Sweeney's "lack of credibility." Puertas Br. at 30. Although Puertas does not specify whom he would have called or which portions of the report would have prompted this action, statements by

two officers in the report concern Sweeney's credibility. Everingham stated that he "personally did not believe that [Sweeney] was reliable enough to work this type of investigation." JA 136-e. And Lieutenant Bill Kuyck stated that "he was uncomfortable because he has known [Sweeney] for some time and believes that [he] has no credibility." JA 138. In addition to claiming that he would have called additional witnesses (presumably Everingham and Kuyck) had he been given the report, Puertas submits that the report would have made him "aware," Puertas Br. at 30, that during Sweeney's interview with the investigating officer, Sweeney stated that "he was agreeable to anything that . . . Quisenberry or Deputy Gary Miller wanted to undertake." JA 141.

Even without having the summaries of the interviews contained in the report in hand before trial, the defense vigorously attacked Sweeney's credibility at trial, exploring and attempting to exploit these precise lines of impeachment. Sweeney admitted that he was addicted to drugs and alcohol and that he had been convicted of two felonies involving dishonesty. *Puertas,* 342 F. Supp. 2d at 659. He testified that he told the police that he would do "whatever it took" to alleviate the charges against his brother and that neither he nor his brother was ultimately prosecuted for their involvement in drug crimes. *Id.* On cross-examination, Sweeney admitted that he had trouble with his memory, that he became an informant for the money and that he bought drugs for personal use after conducting buys for the police. *Id.* Because Sweeney's deposition, preliminary examination and trial testimony all indicated that he would do "whatever it took" to mitigate the charges against his brother, *see* Sweeney Dep. at 237 (June 30, 1998) ("I just told them I would like to get

[my brother] off the hook, whatever it took."); Prelim. Exam. Tr. at 53 (Dec. 29, 1997) ("I just told them that . . . whatever it took, I'd help 'em relieve my brother of a criminal record."); JA 492 (trial testimony: "I just told the police officers I would do whatever it took" "[t]o alleviate the charges" against "[m]y brother."), and because this testimony covered the same ground as Sweeney's statement in the report that he was "agreeable to anything" Quisenberry or Miller wanted, the state court did not unreasonably reject this theory of prejudice. *See Spirko*, 368 F.3d at 610 ("[W]here the defendant was aware of the essential facts that would enable him to take advantage of the exculpatory evidence, the government's failure to disclose it did not violate *Brady*.") (internal quotation marks omitted).

Nor was Puertas prejudiced by not having access to Everingham's and Kuyck's statements in the report, as he had ample opportunities to elicit this information himself before trial. Not only could Puertas have sought to depose these potential government witnesses prior to his criminal trial, *see* Fed. R. Crim. P. 15(a)(1), but he in fact did depose Everingham in connection with a government-initiated civil-forfeiture action that arose from the criminal investigation. During this deposition, which occurred four months before his criminal trial, and two days before the first newspaper articles about the investigation, Everingham stated that he had "concerns" about the Puertas investigation and stated that he had discussed the investigation with Kuyck. *See* Everingham Dep. at 14 (June 16, 1999); *id.* at 90-91. With this deposition testimony in hand, plus the information later reported by local newspapers about Everingham's allegations, plus Puertas's attorney's knowledge of the state investigation, Puertas not only

knew that Everingham had "concerns" about the investigation but also had ample opportunity to develop further support for this theory before trial had he wished.

Puertas separately claims that the report would have made him "aware" that Sweeney "had made a contrary statement as to who identified [Puertas] as a suspect." Puertas Br. at 30. According to the report, Sweeney said that the "decision to investigate" Puertas and his bowling alley "was Deputy Miller's idea." JA 141. But at trial Sweeney testified that he first discussed investigating Puertas with Quisenberry, not Miller, although when pressed he stated that he could not remember if any other officer participated in that conversation. *See* Trial Tr. at 65-66 (Oct. 19, 1999).

In view of the many other ways in which the defense attacked Sweeney's credibility, the advantage that Puertas could have gained by contrasting Sweeney's statement at trial (that Quisenberry first identified Puertas as a suspect) with the statement in the report (that the decision to investigate Puertas was "Miller's idea") arises only at the margins. Additional testimony from police witnesses questioning Sweeney's credibility would have been cumulative and accordingly of slight value. *See Byrd v. Collins*, 209 F.3d 486, 518-19 (6th Cir. 2000). The following cross-examination of Sweeney at trial, at any rate, suggests that the defense already had some knowledge of this statement:

> Q Yesterday, you testified that you had a discussion about going into the Megabowl, right?
>
> A Um hm. Yes.
>
> Q The discussion you said was with Quizenberry [sic] alone, correct?

A Correct.

Q Miller was there, correct?

A I don't remember if he was or not. . . .

Q You might have given a different answer at a different time?

A I don't know. I mean I don't remember.

Trial Tr. at 65 (Oct. 19, 1999).

Puertas next claims that he could have used information in the report to attack the credibility of Quisenberry's testimony in three ways. First, he "would have known, and offered as evidence," Puertas Br. at 30, information in the report that one of the commanders of the investigation, Mark Menghini, said that Quisenberry "conducted a sloppy investigation and cut too many corners" and believed that Sweeney "was not very good and all the purchases were conducted by the informant with no undercover involvement," JA 136-a. Second, Puertas says that Quisenberry's statement in the report that "he did not keep dailies or notes on each transaction" amounted to new evidence. JA 133. Third, while Sweeney testified at trial "that he was paid $50 for the first transaction and $40 for the fourth," Puertas Br. at 31, the report notes that Quisenberry said that Sweeney's payment "would range from $150 to $200 each time" he completed a controlled buy from Puertas, JA 133. This discrepancy, Puertas suggests, shows that Quisenberry might have "ke[pt] the extra $100 or $150 on those two occasions" and that he "was using a phony drug investigation in order to supplement his pay." Puertas Br. at 31-32.

Here too, however, Puertas already knew this information or knew enough about the topic to obtain more

information through civil discovery in his forfeiture action or pre-trial criminal discovery. *See* Fed. R. Crim. P. 15(a)(1). In his forfeiture deposition, Everingham also stated that Menghini had expressed concerns about the case and about Sweeney. In view of this testimony, Puertas had knowledge of Menghini's concerns. And had he wished to obtain additional information about those concerns, he could have interviewed Menghini about Quisenberry, and that is particularly so in view of Everingham's deposition statement that Menghini "stood up and stated that in his 20 some years of service, he's never sent an innocent man to prison and he wasn't about to start with this one." Everingham Dep. at 15-16 (June 16, 1999). The trial transcript also belies Puertas's claim that he did not know that Quisenberry failed to keep notes on each transaction. *See* Trial Tr. at 243 (Oct. 28, 1999) (during closing argument, Puertas's attorney stated that Quisenberry said, "I'm not going to take one note, okay? Not one note. . . . I'm never going to take a note as to what happened, unless there's a deal"). And as to any discrepancy between Sweeney's and Quisenberry's statements regarding Sweeney's compensation, Puertas has not explained why he could not have covered this pertinent topic in a pre-trial deposition of Quisenberry or Sweeney, or during trial. Nor has he explained why this $100 to $150 discrepancy in pay does not at most reflect a confluence of Sweeney's admittedly poor memory and Quisenberry's poor record-keeping.

Puertas next argues that he would have challenged the search warrants in the case had he known about Deputy Gary McClure's statement in the report that when he first started working for the Narcotics Enforcement Team, Miller told him "to add information to the search warrants to flower them up" and "reportedly told [him]

that judges expect police officers to lie." JA 151. But, in truth, Puertas deposed McClure prior to his trial, and these allegations surfaced at that time. *See* McClure Dep. at 32-35 (July 1, 1998) (To strengthen the case for probable cause, "on more than one occasion [Miller] . . . would tell me specifically to put in [affidavits supporting search warrants] that there was short-term traffic . . . observed at a residence that . . . I was . . . investigating . . . [when] I never did any surveillance. . . . And he said, 'Put it in anyways. It's all right. They expect that, the judges expect that. That's not a problem.' "). The defense then relied on these allegations while cross-examining Miller during trial. *See* Trial Tr. at 103 (Oct. 14, 1999) ("Q: And there . . . have been accusations that you committed perjury by a former narcotics enforcement team officer, too. Is that correct?").

Puertas, finally, complains that he was prevented from "interview[ing] and call[ing] witnesses who corroborated that overtime reports had been falsified in order to corroborate false surveillance reports." Puertas Br. at 30. Here, again, the record shows that Puertas knew about these allegations before trial. *See* Everingham Dep. at 18-22 (June 16, 1999) (describing when Quisenberry would tell him to fill out overtime slips for times he had not worked to create the appearance that he had been present conducting surveillance on the Puertas investigation). And during trial, Puertas's attorney raised the allegations when he cross-examined Quisenberry, *see* Trial Tr. at 212-15 (Oct. 22, 1999) (asking Quisenberry about Everingham's allegations), and mentioned them during his closing argument, *see* Trial Tr. at 245 (Oct. 28, 1999) ("Mr. Everingham accuses Mr. Quisenberry . . . on a couple of occasions . . . [of telling] them to fill out over time slips [to

make it appear as though] he was there on the surveillance.").

Our colleague raises an additional point that deserves consideration. As she sees it, Puertas was nonetheless prejudiced because "the Report itself, apart from its contents, has independent significance." Dissent at 6. But Puertas has not made this argument. Perhaps because the report itself *rejects* the allegations of police misconduct, Puertas premises his *Brady* prejudice claim not on the report's existence but on the contents of the report, namely the statements and interviews in it that we have discussed above.

But even if Puertas had made this argument, the logic behind the position is not self-evident – that because the Michigan police "conducted an official investigation from which a Report resulted," "the allegations had some amount of credibility and gravity" even if the report ultimately rejected the allegations. *Id.* at 3. No evidence indicates what degree of "credibility and gravity" is needed to prompt the Michigan state police department to commence an "official investigation" (or whether the suggested distinction between "a general investigation" and "the official investigation," *id.* at 2, exists). And surely Puertas had sufficient information to develop *this* evidence, as his attorney knew about the investigation. Why Puertas chose to focus on the contents of the report rather than what it takes to start an official investigation is not in the record. But it hardly seems unusual that the defense would choose a strategy that focused not on the existence of an investigation (which determined that there was no police misconduct) but on the contents of the interviews contained in the report. Indeed, without the report in hand, Puertas was free to present Everingham's allegations to

the jury, but the jury never learned that the investigation into these allegations concluded that they were unfounded.

No less importantly, no Supreme Court authority supports this theory. *See* 28 U.S.C. § 2254(d)(1). The only case mentioned by the dissent, *Strickler,* involved documents that contained new, valuable information for the defense. *See* 527 U.S. at 266 ("The exculpatory material that petitioner claims should have been disclosed before trial includes documents prepared by [a prosecution witness], and notes of interviews with her, that impeach significant portions of her testimony."); *id.* at 273 (Because the "notes taken by [the detective] during his interviews with [the witness], and letters written by [the witness] to [the detective]" "cast serious doubt on [the witnesses's] confident assertion of her 'exceptionally good memory' " in her trial testimony, "the *content* of the documents is critical.") (emphasis added); *id.* at 273-75 & nn.8-10 (describing the content of the suppressed materials and identifying the information that the defense did not have at trial and that conflicted with the witness's trial testimony and otherwise cast doubt on her credibility). And *Strickler* did not involve a witness that the defense had already deposed. *See id.* at 285 n.27 (noting that the witness "refused to speak with defense counsel before trial"). Puertas, by contrast, did not stand to gain any additional help from the contents of the report. In the absence of Supreme Court authority supporting such a theory, this AEDPA claim necessarily fails.

B.

Puertas separately contends that the state court of appeals unreasonably applied Supreme Court precedent in

denying his prosecutorial-misconduct claim. To prove prosecutorial misconduct, Puertas must show that the challenged remarks infected his trial with such unfairness that his resulting conviction was a denial of due process. *See Byrd,* 209 F.3d at 529. "To constitute a denial of due process, the misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (internal quotation marks omitted).

Puertas first claims that the prosecutor improperly argued facts not in evidence when he suggested that Puertas had planted a bag of harmless white powder that officers discovered in one of Puertas's safes and that he did so as "a dig from that man who knew [the police] were coming." JA 624. The next day, Puertas moved for a mistrial based in part on this statement, arguing that it improperly implied that Puertas was a drug dealer and had been tipped off about the search. The trial court ruled the statement was not "grounds for a mistrial" and noted that "[t]he jury is instructed that if the attorneys argue something that isn't in evidence, they can't consider it." JA 643. Even "[a]ssuming that this reference to [Puertas's] motive for placing the powder in the safe was an unreasonable and improper inference drawn from the evidence," the court of appeals held that the "comment does not warrant relief because a special instruction would have cured any prejudice to defendants." *Puertas,* 2002 WL 31160304, at *14.

As an initial matter, the state court of appeals did not unreasonably apply Supreme Court precedent in holding that Puertas was not prejudiced by the comment for two reasons: first, because the court gave a general instruction at the close of evidence reminding jurors to consider only properly admitted evidence, Trial Tr. at 22 (Oct. 29, 1999);

and second, to the extent that Puertas felt such a general instruction was insufficient, he could have, but did not, request a special curative instruction to mitigate the effects of the statement. Moreover, "prosecutors must be given leeway to argue reasonable inferences from the evidence," *Byrd*, 209 F.3d at 535 (internal quotation marks omitted), and the evidence supported the inferences that the prosecutor drew. Evidence in the record established: that Puertas sold cocaine to Sweeney; that drug-detecting dogs alerted to the safes owned by Puertas; that during the searches of nine safes and other property owned by Puertas, $1.9 million in cash and property was found; and that the day manager of the bowling alley testified that she never saw white powder in the safe and that she kept her white exercise supplement (the suspected source of the bag of harmless white powder) in a desk drawer, not in the safe.

Puertas next claims that the prosecutor violated his Fifth (and Fourteenth) Amendment right not to take the stand by commenting on his silence. *See Griffin v. California*, 380 U.S. 609, 615 n.5 (1965). After closing arguments, in the midst of an exchange between the attorneys concerning a defense objection, Puertas blurted out "He's done it from the start. They lied – ." JA 627. The prosecutor apparently then asked Puertas's attorney "something along the lines of is Mr. Puertas going to testify[?]" JA 641. The court reporter did not transcribe this comment and Puertas's attorney says he did not hear it. But his attorney claimed that someone from the audience heard the comment and brought it to his attention later that day. Puertas then moved for a mistrial, claiming that the comment was audible on a tape of the proceedings and that the jury must have heard it.

The trial court denied the motion, expressing doubt that the jury ever heard the comment and noting that the jury instructions properly explained Puertas's constitutional right to remain silent. The state court of appeals agreed, reasoning that the admission by Puertas's counsel that he did not hear the statement supported the trial court's conclusion that the jury likely did not hear it either. "In any event," it noted, "we assume as we must that the jury instructions remedied the error to the extent one or more jurors heard the comment." *Puertas,* 2002 WL 31160304, at *14.

The state courts did not unreasonably apply Supreme Court precedent in reaching this conclusion. Both before and after this comment allegedly was made, the trial court instructed the jurors that they may not draw negative inferences from Puertas's failure to testify. Even if the jury did hear the comment, which seems unlikely in view of the trial court's ring-side observations of the incident, the instructions properly mitigated any risk that the statement would affect the jury's verdict. *See Richardson v. Marsh,* 481 U.S. 200, 211 (1987).

Puertas next claims that the prosecutor improperly denigrated the defense when, in his closing, he said that the defense presented a case made up of "haze and smoke" and tried to distract the jury with "sound and fury," "bombastic antics" and "smoke and haze and innuendo and insinuation," accusing the defense of presenting evidence "designed to distract you from the truth in this case." Puertas Br. at 42-43. While prosecutors may not make "unfounded and inflammatory attacks on the opposing advocate," *United States v. Young,* 470 U.S. 1, 9 (1985), the Michigan court of appeals noted that "[n]one of these prosecutorial comments drew any defense objections" and

held that Puertas had forfeited this claim, *Puertas,* 2002 WL 31160304, at *14.

Having failed to object to the comments during trial, Puertas violated Michigan's rule that defendants must preserve their claims for appellate review by raising them in the trial court and thus has procedurally defaulted the claim. *Seymour v. Walker,* 224 F.3d 542, 549-50 (6th Cir. 2000) ("[If] a habeas petitioner fails to obtain consideration of a claim by a state court . . . due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review."). Puertas never argues that this is not a consistently enforced procedural-default rule, but he does ask us to excuse his default and to view the failure to object as a strategic decision designed to avoid drawing attention to the prosecutor's remarks. But we may excuse a petitioner's procedural default only if he meets the exacting cause-and-prejudice standard or demonstrates that a fundamental miscarriage of justice will occur if we fail to consider the federal claim. *Coleman v. Thompson,* 501 U.S. 722, 749-50 (1991). Because defense counsel could have objected to these comments outside of the jury's presence (eliminating the strategic dilemma) and because a timely cautionary instruction presumably would have been effective, *see Marsh,* 481 U.S. at 211, Puertas has not established cause for his failure to object. And because Puertas has not submitted any new and reliable evidence of actual innocence, he has not shown a miscarriage of justice. *Willis v. Smith,* 351 F.3d 741, 746 (6th Cir. 2003).

Puertas next argues that the prosecution made an improper civic-duty argument when it said the following during its closing argument:

> After this case is done and then you are able to go home and talk to your loved ones about what the case was about or your neighbors or whoever it is and you get there and you're in your backyard and you're leaning over the fence and you're talking to your neighbor and you say, yep, I just got done with this jury duty and we had this very interesting case. It was a drug case and a racketeering case and a conspiracy case and the Prosecutor had the actual person who bought the drugs from the two defendants and he had officers who actually witnesse[d] the transactions happen and they had $106,000 –.

JA 626.

Generally speaking, a prosecutor has a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Viereck v. United States,* 318 U.S. 236, 248 (1943). But "[u]nless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible." *United States v. Emuegbunam,* 268 F.3d 377, 406 (6th Cir. 2001). Because the Michigan court of appeals did not discuss this claim when Puertas raised it there, we review the claim de novo. Like the district court, we agree that these less-than-pointed remarks appealed "more to the jury's common sense than to the jury's fear of community safety" and did not rise to the level of remarks designed to incite prejudice in a jury. *Puertas,* 342 F. Supp. 2d at 666. Any prejudice, moreover, was cured when the trial court sustained Puertas's objection to the comments and instructed the jury not to consider them in reaching its verdict. *See Marsh,* 481 U.S. at 211.

C.

Puertas also objects to the trial court's failure to instruct the jury about missing evidence. Prior to trial, Puertas requested copies of affidavits prepared in support of search warrants involving controlled buys by Sweeney in an unrelated investigation before he began working on the Puertas investigation. When the prosecution was unable to locate the affidavits, Puertas asked the trial court "for some kind of instruction to the jury" on the missing affidavits. JA 516. Although the trial court denied Puertas's request, it told Puertas he could "argue about it to the jury." JA 612.

A state-law challenge to an allegedly defective jury instruction faces a stiff burden. The claimant must show that the flawed instructions "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten,* 414 U.S. 141, 147 (1973). In reviewing this claim, the Michigan court of appeals noted that in light of the generality of Puertas's request (for "some kind of instruction"), the trial court "acted within its discretion in declining to give an undefined jury charge regarding the prosecutor's inability to produce affidavits from unrelated cases that are sought only for impeachment purposes." *Puertas,* 2002 WL 31160304, at *12.

The court of appeals did not unreasonably apply *Naughten* in reaching this conclusion. Because the missing evidence was at most tenuously connected to the case and because Puertas had ample opportunities to cross-examine Sweeney and the police about Sweeney's credibility, the state appellate court could reasonably conclude that the trial court's refusal to give the requested instruction did not deprive Puertas of a fair trial.

D.

Puertas, lastly, claims that the trial court improperly admitted evidence about the dog sniffs, claiming that the evidence had little or no probative value and was highly prejudicial. He also objects that the court rejected his request for a cautionary instruction about this evidence.

During the searches of Puertas's property, two drug-detecting dogs alerted to nine safes that contained a substantial amount of U.S. currency but did not contain illegal drugs. At trial, two forensic experts and two canine patrol officers testified about the training of the dogs and explained that the dogs' alerts indicated that narcotics recently must have been inside the safes. The trial court rejected Puertas's objection to this evidence and denied his request for a special limiting instruction to the effect that the drug-sniffing-dog evidence has little value as proof and that he could not be convicted on the basis of this evidence alone.

A trial court's error in applying state evidentiary law does "not rise to the level of [a] federal constitutional claim[] warranting relief in a habeas action unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment." *McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004). The Michigan court of appeals held that the trial court did not abuse its discretion in admitting the evidence and concluded that any risk of prejudice from the evidence did not substantially outweigh its probative value.

In attacking this ruling, Puertas argues that a considerable amount of United States currency contains residue from controlled substances and that many recent court decisions acknowledge this fact. At trial, however, the

government's experts testified that a properly trained dog will not alert to the residue found on currency in general circulation. The experts explained that drug-detecting dogs are not trained to alert simply to cocaine but to the odor of methyl benzoate, which dissipates after two hours, making it unlikely that a dog would alert to the odor of the drug on currency unless that currency recently had been in the presence of cocaine.

The high degree of deference we accord state evidentiary decisions means that a claimant generally will not be able to question "rulings regarding the admission or exclusion of evidence . . . in a federal habeas corpus proceeding." *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988). Because Puertas had the opportunity to question the reliability of this evidence at trial and because the challenged testimony addressed the reliability concerns that he raised, the state court of appeals' resolution of this claim does not entitle Puertas to habeas relief.

Much the same holds true for Puertas's argument that the trial court at a minimum should have granted his request for a cautionary instruction about the evidence. Again, we may not grant the writ simply because a jury instruction allegedly was incorrect under state law, *Estelle v. McGuire,* 502 U.S. 62, 71-72 (1991), and in this instance "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law," *Henderson v. Kibbe,* 431 U.S. 145, 155 (1977).

While the state court of appeals concluded that the trial court should have given this instruction, it concluded that the omission did not warrant a new trial because it did not result in a miscarriage of justice. In view of the jury instructions that were given, the court reasoned, the

jury had no basis for relying on the dog-sniff evidence alone to convict Puertas, and this evidence merely corroborated the "very powerful evidence" of six controlled buys of illegal narcotics. *See Puertas,* 2002 WL 31160304, at *11 ("An essential element to the charge of delivering cocaine is evidence of the intent to deliver. This evidence was established through the evidence of narcotic sales at the Megabowl, as demonstrated by the controlled buys executed by Sweeney. Likewise, the crime of operating a criminal enterprise is not established merely by evidence of possession of illegal narcotics and large amounts of cash. Rather, the prosecution was required to prove that [Puertas was] employed or associated with the Megabowl and knowingly participated in the affairs of the Megabowl through a 'pattern of racketeering activity' as that term is defined by Mich. Comp. Laws § 750.159f(c). This pattern of racketeering activity was established by the evidence of multiple sales of narcotics from behind the business counter of the Megabowl.") (footnote omitted). The state court of appeals did not unreasonably apply Supreme Court precedent in reaching this conclusion.

III.

For these reasons, we affirm.

KAREN NELSON MOORE, Circuit Judge, dissenting. This case addresses the prosecution's outrageous failure to turn over to the defendant, Joseph Puertas, a report, completed weeks before trial, detailing an official investigation made by the State Police of allegations of local police misconduct in their investigation of Puertas. The prosecution's withholding of such vital information,

which goes to the legitimacy of the state's case against Puertas, cannot be justified here. The majority denies Joseph Puertas habeas relief on his claim of state suppression of evidence under *Brady v. Maryland,* 373 U.S. 83 (1963), because it concludes that the Michigan Court of Appeals did not unreasonably apply Supreme Court precedent in deciding that Puertas failed to show prejudice, the third element of a *Brady* claim.[1] Because I believe that the Michigan Court of Appeals unreasonably determined that Puertas has not satisfied the second and third elements of *Brady,* I respectfully dissent.

The majority agrees with the conclusion of the Michigan Court of Appeals that Puertas "failed to demonstrate that [he] exercised reasonable diligence to obtain the Michigan State Police public corruption investigative report," in particular because there was media coverage about the investigation of Oakland County Deputy Sheriff Kenneth Everingham's allegations of police misconduct.[2] *People v. Puertas,* No. 224173, 2002 WL 31160304, at *5

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[1] A successful *Brady* claim must satisfy the following three elements: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999).

[2] Although the majority classifies this aspect of the *Brady* analysis – whether a defendant could have independently accessed the information contained in the *Brady* material – as part of the third element's prejudice inquiry, it is better viewed as part of the inquiry under *Brady*'s second element – whether the prosecution suppressed the evidence. The prosecution can only suppress evidence that is "wholly within [its] control," and thus if a defendant knew enough to have taken advantage of the evidence or could have accessed the evidence from another source, it is the second element of *Brady* that has not been met. *See Coe v. Bell,* 161 F.3d 320, 344 (6th Cir. 1998).

(Mich. Ct. App. Sept. 27, 2002). Specifically, the majority concludes that Puertas either had knowledge of the contents of the Michigan State Police investigative report ("Report"), which memorialized the results of the investigation of Everingham's allegations, or that he had sufficient knowledge to have found the information contained therein with additional efforts. Majority Opinion ("Maj. Op.") at 5.

The conclusion on this point by both the majority and the Michigan Court of Appeals erroneously conflates several separate elements relating to Everingham's accusations of misconduct – the accusations themselves, a general investigation into the accusations, the official investigation done by the Michigan State Police, information that happened to be in the Report, and the fact that the Report existed and that particular information was contained in the Report – each of which has independent significance. Comments by Puertas's trial attorney reported in The Oakland Free Press indicate that Puertas knew about some of the allegations of police misconduct related to the investigation of Puertas. However, even if it could be shown that Puertas knew of the allegations and of some investigation into the allegations, it does not follow that he knew about the official investigation conducted by the Michigan State Police and that a Report containing the results was produced.[3]

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[3] The article quoting Puertas's trial attorney was published on June 18, 1999. *See* Stephen W. Huber, *Ex-Deputy Says He Lied About Seeing Drug Sale,* The Oakland Press, June 18, 1999, at A-1, A-12. That article indicates that Puertas knew about some of Everingham's allegations. Although this article and another later-published article mention an investigation into the allegations, and thus Puertas could be charged with knowledge of an investigation, *see id.*; L.L. Brasier,

(Continued on following page)

Independent knowledge of some of the information that happened to be contained in the Report is not the equivalent, for *Brady* purposes, of knowledge that a Report was issued and that certain claims could be substantiated by the Report. The fact that the Michigan State Police conducted an official investigation from which a Report resulted indicates that the allegations had some amount of credibility and gravity. Although Puertas knew about some of the information included in the Report, that an official investigation was conducted and a Report was issued lends credence to the possibility that Puertas was set up and that the charges against him were entirely fabricated. Puertas's knowledge of some of the contents of the Report, including problems with the credibility of the informant Joseph Sweeney, discrepancies in testimony, and irregularities related to his own investigation that are documented in the Report, and his reliance on this information at trial, is not dispositive of whether Puertas was prejudiced by not having access to the Report. Substantiating these suggestions regarding shortcomings in the investigation of Puertas with the official Report by the Michigan State Police would have lent them much greater weight with the jury, and thus the prosecution's failure to disclose the Report was prejudicial. *See Strickler v. Greene,* 527 U.S. 263, 284-85 & n.26 (1999) (distinguishing between the fact that interviews had occurred and the contents of those interviews, on the one hand, and that

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Oakland Drug Case Tests Police Claims on $5 Million, Detroit Free Press, Oct. 8, 1999, at 1B, it is not clear from the record when the Michigan State Police began its official investigation. Moreover, as discussed at greater length in the main text, knowledge of the investigation is not equivalent to knowledge of the resulting Report for *Brady* purposes.

documents relating to these interviews had been produced, on the other).

The majority agrees with the conclusion of the Michigan Court of Appeals that Puertas had sufficient knowledge to have accessed the Report through "reasonable diligence" because local media articles reported on Everingham's allegations and the resulting police investigation. Maj. Op. at 5-6; *Puertas,* 2002 WL 31160304, at *5. However, in the context of an analysis of whether cause had been shown to overcome procedural default, the Supreme Court rejected this same inferential leap. *See Strickler,* 527 U.S. at 284-85. The Court held that "a letter published in a local newspaper" containing statements from a witness that made it clear that she had been interviewed several times by a particular detective was insufficient to alert the defendant to the existence and suppression of records relating to those interviews. *Id.*

In this case, although the investigation and Report were completed on September 23, 1999, the Report itself came to light only after Puertas's conviction, when, pursuant to requests made under the Freedom of Information Act, 5 U.S.C. § 552, a newspaper obtained copies of the Report and made them available to the defense. This belies the contention of the Michigan Court of Appeals that the Report would have been available to Puertas were it pursued with "reasonable diligence." *Puertas,* 2002 WL 31160304, at *5. Moreover, Puertas *did* in fact make a motion for additional discovery, which was granted on June 10, 1998. Puertas should not have been expected to "scavenge for hints of undisclosed *Brady* material," *Banks v. Dretke,* 540 U.S. 668, 694-95 (2004), because he reasonably relied on the discovery order, which directed the prosecution to turn over to Puertas "[a]ny and all statements of

interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial . . . whether in the possession of the Oakland County Prosecutor's Office or *any of the police investigating agencies.*" Joint Appendix at 113 (Order Granting Motion for Additional Discovery) (emphasis added).

The Supreme Court has repeatedly held that a defendant can reasonably rely on the prosecution's representation that it has disclosed all *Brady* evidence, and that once the prosecution confirms this representation, the defendant is under no further duty to investigate additional *Brady* materials. *See Banks,* 540 U.S. at 692-94 (acknowledging reasonable reliance on the state's assertion that it would disclose all *Brady* material); *Strickler,* 527 U.S. at 289 (recognizing reasonable reliance on the prosecution's open-file policy). Like the defendants' reasonable reliance on the assertion in *Banks* and the open-file policy in *Strickler,* Puertas reasonably relied on the state trial court's order that the prosecution turn over to him materials like the Report in question. That the prosecution was under this continuing obligation by order of the court to disclose such materials confirmed Puertas's reasonable reliance, thereby relieving him of the responsibility of inquiring about additional *Brady* materials. *Cf. Banks,* 540 U.S. at 694 ("[I]t was . . . appropriate for [the defendant] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction."); *Strickler,* 527 U.S. at 286 (noting "[t]he presumption, well established by tradition and experience, that prosecutors have fully discharged their official duties" (quotations omitted)). Puertas had no reason to suspect that a Report had been issued, and, even

if he did, he would have reasonably relied on the prosecution to comply with the court order to turn over such materials. *See Banks,* 540 U.S. at 693-94; *Strickler,* 527 U.S. at 285-88.

Given that knowledge of the Report does not flow from knowledge of the allegations and the investigation, that Puertas did not neglect to act with "reasonable diligence" in failing to discover the Report, and that the fact of the Report itself, apart from its contents, has independent significance in terms of prejudice, the majority's explanations regarding what Puertas either knew or should have known about the contents of the Report are insufficient to refute the materiality of the Report. We review the conclusion of the Michigan Court of Appeals that the Report was not material, a mixed question of law and fact, to assess whether it was an "unreasonable application" of the Supreme Court's governing standard on materiality – whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Kyles v. Whitley,* 514 U.S. 419, 433 (1995). *See* 28 U.S.C. § 2254(d)(1); *Joshua v. DeWitt,* 341 F.3d 430, 436 (6th Cir. 2003); *Lancaster v. Adams,* 324 F.3d 423, 429 (6th Cir. 2003). The reasonable-probability standard is met "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles,* 514 U.S. at 434 (quoting *United States v. Bagley,* 473 U.S. 667, 678 (1985)).

As discussed earlier, although Puertas may have raised a variety of impeaching and exculpatory information at trial that was contained in the report, including the lack of credibility of the informant, Joseph Sweeney, and other problems with the investigation, Puertas did not, because he could not, rely on the fact that this information

was credited by an official investigation by the Michigan State Police, which would have greatly enhanced the value of this information.[4] Only if Puertas had knowledge of and access to the Report could he have presented the pertinent parts of the Report so that the impeaching evidence could be accorded the proper weight by the jury. In particular, the Report confirms inconsistencies regarding how Puertas was identified as a suspect, which constitutes powerful exculpatory evidence because it supports the theory that Puertas was set up and that the charges against him were completely manufactured. It is unreasonable for the Michigan Court of Appeals to fail to acknowledge that the Report by the Michigan State Police (confirming the incredibility of the informant, the sloppy work of the local police, and the discrepancies in the local officers' statements) would have far greater influence than the defense attorney's mere suggestion of the same evidence.

The Michigan Court of Appeals relies heavily on the evidence in the Report that it considers unfavorable to Puertas (namely, that Everingham was an irresponsible employee with a gambling problem and that the Report ultimately found his allegations to be unfounded) to determine that Puertas was not prejudiced by the unavailability of the Report. The Michigan Court of Appeals

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[4] The majority's explanation of one discrepancy is particularly unsatisfying. Sweeney, the informant, testified at trial that on several occasions he was paid $50 to $160 less than what Sergeant Kenneth Quisenberry of the Oakland County Sheriff's Department told the Michigan State Police that Sweeney was paid for each drug transaction. The majority states that this "at most reflect[s] a confluence of Sweeney's admittedly poor memory and Quisenberry's poor record-keeping." Maj. Op. at 11. However, Puertas should have had this information available to him both for impeachment purposes and to suggest that Quisenberry's motives were tainted by financial interest.

was unreasonable in reaching this conclusion. First, the state court should have recognized that the Oakland County Sheriff's Department ("the Sheriff's Department") had motives to downplay the problems with its investigation of Puertas. In addition to a desire to preserve its integrity, the Sheriff's Department faced civil liability due to a lawsuit brought by Everingham and also stood to reap financial benefits from the Puertas case due to the forfeiture of the assets involved. *See* L.L. Brasier, *Oakland Drug Case Tests Police Claims on $5 Million,* Detroit Free Press, Oct. 8, 1999, at 1B. Second, the fact that the Report ultimately concluded that Everingham's allegations were unfounded is not highly relevant to the *Brady* prejudice analysis because the evidentiary standard used by the Michigan State Police to confirm such allegations is markedly different from the evidentiary standard required to convict Puertas. Although there may not have been sufficient evidence for the State Police to conclude that misconduct occurred, the Report could, and in fact, does, raise enough suspicions regarding the investigation of Puertas to create a reasonable doubt as to his guilt. For these reasons, the suppressed evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." *See Kyles,* 514 U.S. at 435. The Michigan Court of Appeals acted unreasonably in applying the prejudice component of *Brady.*

The majority affirmed the district court's denial of Puertas's *Brady* claim on the third element and therefore found no need to discuss the other two elements.[5] Because

[5] As explained in note two above, the majority's rejection of the claim on the ground that Puertas knew the substance of Report or knew enough to discover it through further inquiry is best understood as

(Continued on following page)

I believe, as explained above, that Puertas has satisfied *Brady*'s third element, I will address the first two elements. As the majority notes, there is no dispute that Puertas has satisfied the first element of his *Brady* claim because the Report has both exculpatory and impeachment value.[6] *See Strickler,* 527 U.S. at 281-82.

The Michigan Court of Appeals concluded that Puertas failed to satisfy the second element, which requires that the evidence has been suppressed by the state, *Strickler,* 527 U.S. at 282, because "possession" of the product of the Michigan State Police investigation could not be imputed to the prosecution or the Sheriff's Department, *Puertas,* 2002 WL 31160304, at *5. The district court erred in concluding that this decision was reasonable. *Puertas v. Overton,* 342 F. Supp. 2d 649, 659 (E.D. Mich. 2004).

The Supreme Court has held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles,* 514 U.S. at 437. Supreme Court precedent does not require possession to trigger the prosecutor's duty to disclose, and in fact, holds quite the opposite. In *Kyles,* the Court expressly rejected the state's argument that it had no duty to disclose materials

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falling within the second element – whether the prosecution suppressed the evidence.

[6] Puertas contends that the Michigan Court of Appeals erroneously decided that impeaching evidence is not favorable evidence under *Brady.* The district court correctly concluded that the Michigan Court Appeals recognized both the proper significance of impeaching evidence under *Brady*'s first element and that Puertas had satisfied this element of *Brady* based on the Report's impeachment value. *Puertas v. Overton,* 342 F. Supp. 2d 649, 658 (E.D. Mich. 2004).

known only to the police and not to the prosecution. 514 U.S. at 438. In dismissing this suggestion, the Court stated that "[s]ince, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id.* The Court explained that "'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" *Id.* (quoting *Giglio v. United States,* 405 U.S. 150, 154 (1972)). It is clear, then, that the Supreme Court does not require actual knowledge, much less possession, of evidence, to satisfy the second element of *Brady.* Because the Sheriff's Office repeatedly interviewed individuals from the Oakland County Prosecutor's Office ("the Prosecutor's Office") in the course of its investigation of Everingham's charges, it is equally clear that the prosecution was aware of "favorable evidence known to the others acting on the government's behalf in the case." *Kyles,* 514 U.S. at 437.

The decision of the Michigan Court of Appeals that "the investigation by the State Police was not taking place on behalf of the Oakland County Prosecutor[,]" and "may fairly be characterized as being adverse to the Oakland County Sheriff's Department," *Puertas,* 2002 WL 31160304, at *5, is unreasonable because it fundamentally misunderstands the role of the prosecutor as set forth by the Supreme Court. The prosecutor is "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice

shall be done,'" *Kyles,* 514 U.S. at 439 (alterations in the original) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). The Prosecutor's Office, of course, has no interest in pursuing a conviction based on fabricated charges or false evidence. Therefore, the Michigan State Police investigation, conducted with the full cooperation and involvement of the Prosecutor's Office, was conducted "on the government's behalf in the case" because it was aimed at preserving the integrity of Puertas's criminal prosecution. *See Kyles,* 514 U.S. at 437-40. The prosecution's withholding of this critical document from Puertas reveals an indefensibly narrow view of its duty to disclose.

For the foregoing reasons, the denial by the Michigan Court of Appeals of Puertas's *Brady* claim constituted an "unreasonable application of [] clearly established Federal law." 28 U.S.C. § 2254(d)(1). Therefore, I would grant Puertas's habeas petition on this basis. I respectfully dissent.

342 F.Supp.2d 649

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH EDMUND PUERTAS,

Petitioner

v.

WILLIAM OVERTON, Director, Michigan Department of Corrections, NICK LUDWICK, Warden, Egeler Reception and Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County,

Respondents. /

Civil Case Number: 03-40157

HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER DENYING PETITION FOR THE WRIT OF HABEAS CORPUS

Before the Court is a petition by Joseph Edmund Puertas for the writ of habeas corpus under 28 U.S.C. § 2254. For the reasons set forth below, the Court will deny the petition.

I. BACKGROUND

Petitioner was tried in Oakland County Circuit Court with co-defendant James Michael Talley. On November 1, 1999, the jury convicted Petitioner of (1) conspiracy to deliver 50 to 225 grams of a controlled substance, second offense under Michigan Compiled Laws § 333.7413(1)(c), (2) operating a criminal enterprise under Michigan Compiled Laws § 750.159i(1), and (3) six counts of delivery of

less than 50 grams of cocaine, second offense under Michigan Compiled Laws § 333.7413(2). Co-defendant Talley was convicted of operating a criminal enterprise and three counts of delivery of less than 50 grams of cocaine. Talley was sentenced to lifetime probation. The Michigan Court of Appeals summarized the events leading to these convictions:

> On August 7, 1997, the Oakland County Sheriff's Department raided the home of Jimmy Sweeney, seized cocaine, money and guns, and arrested Jimmy Sweeney and his brother, Joseph Sweeney. Joseph Sweeney cooperated with the arresting officers and pledged to do whatever it would take to ensure that Jimmy would not face drug charges, including working with police to buy illegal narcotics as part of an undercover investigation (controlled buys). Joseph Sweeney (Sweeney) successfully completed two controlled buys in Pontiac and was advised that he had "worked off" his brother Jimmy's drug charges.[1]
>
> Thereafter, Sergeant Ken Quisenberry of the Oakland County Sheriff's Department, who was then assigned to the Narcotics Enforcement Team (NET),[2] asked Sweeney to serve as a paid informant.[3] Detective Sergeant Gary Miller of the Oakland County Sheriff's Department and Sgt. Quisenberry discussed with Sweeney drug trafficking in Oakland County. Sgt. Miller mentioned

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[1] Neither Jimmy Sweeney nor Joseph Sweeney was ever charged with any crime arising from the August 7, 1997 raid of Jimmy's house.

[2] The NET was described at trial as a Michigan State Police coordinated program that brought together officers from eight different law enforcement agencies in Oakland County.

[3] Sweeney was paid from $40 to $150 for participating in each successful controlled buy involving defendants.

Puertas and advised Sweeney that Puertas was dealing narcotics out of his business, the Megabowl bowling alley. Sweeney offered to try to buy cocaine from Puertas at the Megabowl.

The prosecution maintains that between August 19 and August 30, 1997, Sweeney successfully completed four controlled buys of cocaine from Puertas, Talley or both. The amount of cocaine ranged between one-quarter and three-quarter ounces per buy. Sgt. Quisenberry and Sweeney testified that Sweeney was searched to ensure that he had no drugs or money on his person or within his control before each buy was attempted. Sweeney was followed from the time he was given the money to purchase the drugs until he turned over any evidence of a drug purchase. For each transaction after the initial controlled buy, Sgt. Quisenberry had one or more officers inside the Megabowl whose duty it was to observe Sweeney upon his entry into the Megabowl. For two of these four controlled buys, the sole surveillance officer assigned to observe the transactions within the Megabowl was Oakland County Deputy Sheriff Kenneth Everingham. On one other occasion, Deputy Everingham was assigned surveillance with another member of the Oakland County Sheriff's Department, Sergeant Chris Yuchasz.

Between August 31 and September 24, 1997, Sgt. Quisenberry, through Sweeney, attempted five or six additional controlled buys without success. On September 25, 1997, Sweeney successfully completed a fifth controlled buy. This time, Sgt. Quisenberry personally drove Sweeney to

the Megabowl, followed Sweeney into the Megabowl and joined Sgt. Yuchasz to conduct surveillance from within the Megabowl.[4]

Sweeney successfully completed a sixth controlled buy on November 18, 1997. Again, Sgt. Quisenberry followed Sweeney into the Megabowl and joined two other officers to conduct surveillance of the interaction between Sweeney and Puertas. This transaction yielded two "coin envelopes containing cocaine."

After the November 18 transaction, Sgt. Quisenberry sought and obtained search warrants to search the Megabowl and other locations where defendants were observed during the investigation. Search warrants were issued for twelve different locations and, on December 16, 1997, the warrants were executed. This search involved approximately 110 investigators and two dogs purportedly trained to alert to the scent of certain illegal narcotics. The two dogs alerted to nine different safes, although no drugs were found in any of these safes. The officers in charge of the dogs testified that their dogs would alert to the trace odor that lingers even after drugs have been removed from a place. Subsequent to the search, the Oakland County Prosecutor filed a forfeiture action against the Megabowl and almost two million dollars in cash and property seized during this raid.[5]

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[4] Sgt. Quisenberry followed Sweeney out of the Megabowl. Sgt. Quisenberry was surprised when Sweeney produced one-quarter ounce of cocaine because, from what Sgt. Quisenberry was able to observe, it did not appear that a transaction took place.

[5] *See In re Forfeiture $1,923,235,* 247 Mich. App. 547, 637 N.W.2d 247 (2001).

. . . .

> At trial, the prosecution's theory was that Puertas and Talley conspired with each other to sell cocaine to Megabowl customers, which the police confirmed through Sweeney's controlled buys. In contrast, Puertas and Talley claimed that they were innocent and that the prosecution's motivation in bringing the criminal charges was to provide a basis for the civil forfeiture action. The jury rejected defendants' claims that they were innocent, except that Talley was found not guilty of the conspiracy charge.

People v. Puertas, No. 224173, at 2-4 (Mich. Ct. App. Sept. 27, 2002) (footnotes in original).

On December 2, 1999, the trial court sentenced Petitioner to two to twenty years in prison for operating a criminal enterprise and two to forty years in prison on each of the six delivery counts. All of the sentences were to run consecutively. The trial court vacated Petitioner's conspiracy conviction because co-defendant Talley was acquitted of conspiracy.

Petitioner raised his habeas claims in a direct appeal to the Michigan Court of Appeals. While his appeal was pending, he sought an un-redacted copy of a state police report concerning an investigation into allegations of public corruption in this case. The trial court granted Petitioner's motion and authorized the release of the unredacted state police report. Petitioner moved for a new trial after he received the report. On May 8, 2000, the trial court granted Petitioner's motion and set aside Petitioner's convictions on the grounds that the prosecution had violated the court's discovery order and withheld evidence favorable to the defense. The prosecution then

filed a cross appeal in which it challenged the trial court's decision. On September 27, 2002, the Michigan Court of Appeals upheld the judgment acquitting Petitioner of conspiracy, but affirmed Petitioner's other convictions and reversed the trial court's grant of a new trial. *Puertas,* Mich. Ct. App. No. 224173, at 17. Petitioner appealed the decision by the Michigan Court of Appeals to the Michigan Supreme Court. On May 22, 2003, the Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed. *People v. Puertas,* 468 Mich. 905; 661 N.W.2d 583 (2003). On October 24, 2003, the Michigan Supreme Court denied Petitioner's motion for reconsideration. *See People v. Puertas,* ___ Mich. ___; 670 N.W.2d 670 (2003).

Meanwhile, on June 23, 2003, Petitioner filed his habeas corpus petition in this Court claiming the following grounds for relief:

> I. Where the prosecutors and the police were aware of an investigation into public corruption in the investigation of the petitioner, they were constitutionally obligated to give the defense documents from that investigation which contained exculpatory and impeaching materials. The state's appellate courts erred in finding that the prosecution was not required to turn over impeaching materials and in grafting on a requirement that the materials discoverable were ones limited to the case at bar. The decision of the state's appellate courts was contrary to and an unreasonable application of the holding in *Brady, Kyles*, and their progeny.

II. The following comments by the prosecution were so egregious as to render the whole trial fundamentally unfair:

A. The prosecutor improperly argued facts not of record.

B. The prosecutor improperly commented on Petitioner's failure to testify.

C. The prosecution improperly denigrated the defense.

D. The prosecution improperly encouraged the jury to convict Petitioner in order to protect the community.

III. In finding that there was no error in failing to give a requested instruction on the presumption regarding missing evidence, the state court issued an opinion that was an unreasonable application of clearly established federal law as determined by the United States Supreme Court and was also contrary to clearly established federal law as determined by the United States Supreme Court.

IV. In this case in which no drugs were discovered despite the execution of 12 search warrants, the admission of evidence that drug-sniffing dogs had identified the odor of narcotics in the areas searched rendered the trial fundamentally unfair where the evidence had little or no probative value. The failure of the trial court to give the requested cautionary instruction also denied Petitioner fundamental fairness and his right to a properly instructed jury.

A. The evidentiary value of testimony concerning alerts by drug-sniffing dogs is of such little value that its use in the instant case denied Petitioner fundamental fairness under the Fifth Amendment.

B. The court of appeals erred in ruling that the failure to instruct the jury as to the usefulness of the "dog sniff" evidence did not create a miscarriage of justice.

The Court granted Petitioner's motion for bond pending review of his habeas petition. *Puertas v. Overton,* 272 F. Supp. 2d 621 (E.D. Mich. 2003) (Gadola, J.). Respondents urge the Court to deny the habeas petition for lack of merit in all of Petitioner's claims.

II. STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Petitioner is entitled to relief only if he can show that the state court's adjudication of his claims on the merits either

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Thus, under § 2254(d), Petitioner must show that the state court's decision "was either contrary to, or an unreasonable application of, [the Supreme] Court's clearly established precedents, or was based upon an unreasonable determination of the facts." *Price v. Vincent,* 538 U.S. 634, 639 (2003).

A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). A state court's decision is an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

III. DISCUSSION

A. The Brady Claim

Petitioner's first habeas claim alleges that under *Brady v. Maryland,* 373 U.S. 83 (1963), the prosecution was obligated to provide the defense with the state police report concerning the investigation into allegations of public corruption. Petitioner alleges that the state police report contained exculpatory and impeaching materials.

The Michigan Court of Appeals reviewed this claim and concluded that (1) the trial court erred in concluding that the prosecutor possessed work product of the state police; (2) Petitioner failed to demonstrate that he exercised

reasonable diligence to obtain the state police report; and (3) there was not a reasonable probability that the report would have resulted in a different outcome. Petitioner contends that the Michigan Court of Appeals erred in concluding that the prosecution was not required to turn over the state police report and in concluding that discoverable materials are limited to materials in the case at bar. Petitioner argues that the holdings of the Michigan courts were contrary to and an unreasonable application of *Brady v. Maryland,* 373 U.S. 83 (1963) and related cases. As discussed below, this Court determines that Petitioner fails to demonstrate that all of the components of a *Brady* claim have been satisfied. Petitioner is therefore not entitled to relief on this claim.

1. The Facts

The Michigan Court of Appeals summarized the facts giving rise to Petitioner's first habeas claim as follows:

> In June 1998, more than a year before trial, the trial court entered a stipulated supplemental discovery order. This order provided that the prosecution had to give the defense:
>
> a. Any exculpatory information or evidence known to the prosecution regarding any individual, including, but not limited to, the Defendant's wife, children, any plea agreement, grant of immunity or other agreement for testimony in connection with the case.
>
> b. Any and all statements of interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial, shall be turned over forthwith, whether in the possession of the Oakland County

Prosecutor's Office or any of the police investigating agencies.

c. Any expert, scientific testimony, the names of the witnesses of [sic] any experts or scientific testimony that the prosecution intends to present in trial in their direct case or rebuttal. •

In June 1999, approximately four months before trial, local newspapers published articles in which it was claimed that Everingham, the Oakland County deputy sheriff who allegedly acted as the sole surveillance officer for two of the controlled buys at the Megabowl, had lied at Puertas' preliminary examination and that Sgt. Quisenberry fabricated portions of his reports.

The Michigan State Police immediately commenced a public corruption investigation that ultimately produced a report detailing the investigation. The report documents interviews with numerous individuals involved in the Megabowl investigation or other law enforcement agents who had contact with those individuals. Not all the information directly touched on the case against Puertas and Talley. Some of the information detailed problems Everingham and others were having at work. None of the statements provided a "smoking gun," such as information that Quisenberry provided Sweeney with cocaine before the controlled purchases to frame Puertas and Talley. However, the report may fairly be characterized as having impeachment value to the defense as it relates to the credibility of some of the key players in the Megabowl investigation.

At the conclusion of an extensive eleven-week investigation, the Michigan State Police

concluded that Everingham's allegations were "unfounded." Persuasive to the investigating officer was the lack of evidence, documents, or other support to bolster Everingham's claims. This investigation closed on September 23, 1999, approximately two weeks before the first day of trial.

. . . .

Prior to sentencing, defense counsel obtained a redacted portion of the State Police's public corruption investigative report, which prompted several post-verdict motions. The trial court denied the defense motions for directed verdict of acquittal with respect to all but Puertas' conviction of conspiracy to deliver cocaine. Both defendants had also moved the trial court to grant them a new trial because of what they viewed as improper profile evidence related to the drug-sniffing dogs, prosecutorial misconduct during closing arguments, and the prosecution's discovery violation in failing to give the defense the State Police's public corruption investigative report. The trial court initially rejected each of these grounds.

While the appeals were pending, the trial court granted Puertas and Talley's joint motion for additional discovery concerning the State Police's public corruption investigative report. The prosecution claimed not to have a copy of the report, but the parties stipulated to an order compelling the Michigan State Police to provide a complete copy of the report for the trial court to review in-camera. The trial court also provided defendants a copy of the portion of the report concerning Everingham's allegations against Quisenberry.

> On rehearing of the motion for a new trial, the trial court concluded that by failing to provide defendants a copy of the State Police public corruption investigative report, the prosecution had committed a *Brady* [*v. Maryland,* 373 U.S. 83 (1963)] violation and also violated the pretrial discovery order, thus undermining the reliability of the trial's outcome. The trial court set aside defendants' convictions and reinstated their bonds pending the new trial. The prosecution filed a cross-appeal as of right from the trial court's order granting defendants a new trial.

Puertas, Mich. Ct. App. No. 224173, at 3-5.

2. Analysis

The Supreme Court has held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States,* 405 U.S. 150, 154 (1972).

A *Brady* violation has three components: [1] "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley,* 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley,* 473 U.S. 667, 682, 685 (1985)). The Supreme Court has recently explained that, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke,* 540 U.S. 668, ___, 124 S.Ct. 1256, 1264 (2004). The Supreme Court has further stated that

> [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting *Bagley,* 473 U.S. at 678). Materiality must be determined by evaluating the evidence collectively, not item by item. *Id.* at 436.

a. Evidence Favorable to the Accused

The first component of the *Brady* test is satisfied because some of the evidence in the state police report could have been used as impeachment evidence. The duty to disclose evidence "encompasses impeachment evidence as well as exculpatory evidence." *Strickler,* 527 U.S. at 280 (citing *Bagley,* 473 U.S. at 676). Assuming that the trial court would have permitted Petitioner to refer to the state police report, Petitioner could have used the report to question witnesses about the integrity of the investigation

in this case. Defense counsel could have asked witnesses, or called additional witnesses to testify, about: (1) Sergeant Quisenberry's comment in the report that he did not keep notes on each narcotics transaction (Pet'r App. at 53a); (2) former NET commander Mark Menghini's comments to the state police investigator that (a) Sergeant Quisenberry had said "a deal had to be reached" and "some of the information within the investigation was not really the way things were observed," (b) Sergeant Quisenberry "conducted a sloppy investigation and cut too many corners," and (c) all the narcotics purchases were conducted by an informant who was not very good and who conducted his buys without involvement from undercover officers (*Id.* at 57a); (3) Everingham's and Lieutenant William Kuyck's opinions that the informant was unreliable (*Id.* at 61a and 63a); (4) Everingham's assertion that his boss, Sergeant Jim Ahern, told him to "shut up" and to do as he was told when Everingham expressed his concerns about the case (*Id.* at 61a); and (5) Chris Yuchaz's and Everingham's allegations that Sergeant Quisenberry instructed them to record overtime that was not worked, and listed their names as surveillance on the police reports (*Id.* at 68a).

Petitioner alleges that the Michigan Court of Appeals incorrectly concluded that impeachment evidence was not favorable evidence. The Michigan Court of Appeals did state that, "[a]t best, the information revealed in the State Police's report was collateral or impeaching evidence; not exculpatory evidence." *Puertas,* Mich. Ct. App. No. 224173, at 7. The Michigan Court of Appeals, however, also stated that the state police report was "potentially beneficial to [the defendants] by way of suggesting possible avenues for impeachment of prosecution witnesses." *Id.* at 8 n.10.

Additionally, the Michigan Court of Appeals stated that "the report may fairly be characterized as having impeachment value to the defense as it relates to the credibility of some of the key players in the Megabowl investigation." *Id.* at 4. Consequently, the Michigan Court of Appeals did recognize that impeachment evidence is within the scope of *Brady* and that the evidence in this case was favorable to the accused. Thus, this component of the test has been satisfied.

b. Suppression by the Prosecution

The second component of the *Brady* test requires the Court to determine if the state suppressed the evidence. The Michigan Court of Appeals determined that the state did not possess the evidence, and therefore did not suppress it. Petitioner contends that the Michigan Court of Appeals grafted a new requirement onto *Brady* when the court stated that the duty to learn of evidence favorable to the defense is limited to evidence "known by government actors *working on the same case.*" *Puertas,* Mich. Ct. App. No. 224173, at 6 (citing *Kyles,* 514 U.S. at 437) (emphasis in original). The Michigan Court of Appeals then stated that

> [i]n this instance, the investigation by the State Police was not taking place on behalf of the Oakland County Prosecutor. In fact, these proceedings may fairly be characterized as being adverse to the Oakland County Sheriff's Department. Thus, it is unreasonable to impute to the prosecutor or the Sheriff's Department possession of the work product resulting from the State Police's public corruption investigation. Admittedly, the prosecutor and those police officers assisting in building the prosecution's case against

> defendants were aware of the State Police investigation into Everingham's allegations of public corruption. However, such knowledge does not support the conclusion that the work product the State Police generated in the public corruption investigation was ever in the hands of the Oakland County Prosecutor or the law enforcement officers involved in the Puertas and Talley investigation, or that those actors were in a position to demand possession of the State Police work product. The trial court thus erred in charging the prosecutor with possession of the report.

Id.

The record supports the finding by the Michigan Court of Appeals that the prosecution did not possess the unredacted state police report before or during trial. After trial, the parties stipulated that the state police should forward a complete, unredacted copy of its report to the trial court for *in camera* review. The trial court then reviewed the report and stated that it was discoverable.

Prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles,* 514 U.S. at 437. This duty, however, does not extend indefinitely beyond the scope of the case. The Michigan Court of Appeals concluded that possession of the state police report could not be imputed to the prosecutor or to the Sheriff's Department. This conclusion is not unreasonable. The state police were independently investigating allegations that events leading to the prosecution of Petitioner were tainted by public corruption. This investigation was not conducted by the prosecutor and could even be considered adverse to the Sheriff's Department involved in Petitioner's case.

Thus, Petitioner has not demonstrated that the prosecutors or relevant police officers possessed the information. Therefore, this component of the *Brady* claim has not been demonstrated. Even if this component were satisfied, the following section demonstrates that the undisclosed evidence does not satisfy the third *Brady* component of prejudice.

c. Prejudice

Petitioner alleges that, if he had reviewed the state police report before trial, he would have conducted additional investigation and called witnesses to comment on (1) informant Joseph Sweeney's lack of credibility, (2) allegations that overtime reports were falsified to corroborate surveillance reports, (3) the flawed and sloppy investigation, and (4) the use of an incredible informant for whom there was no undercover surveillance. Petitioner alleges that, without the report, he was unaware that (1) Sergeant Quisenberry did not keep notes on the individual drug transactions, (2) Sweeney had agreed to do anything that the police wanted him to undertake, (3) Sweeney made a contrary statement as to who identified Petitioner as a suspect, (4) a deputy sheriff stated that, some years earlier, he had been advised by one of the officers involved in the Puertas investigation to "flower up" affidavits when requesting search warrants and that judges expect police officers to lie when applying for search warrants; and that (5) Sergeant Quisenberry told the state police investigator that he paid Sweeney between $150 to $200, whereas Sweeney testified that he paid Sweeney $50 for the first transaction and $40 for the fourth transaction. The Court concludes that Petitioner was not prejudiced by the alleged suppression of the state police report.

First, although the state police report could have been used to impeach the testimony of Sergeant Quisenberry and informant Joseph Sweeney, both witnesses were examined and cross-examined extensively at trial. Sweeney testified that he was addicted to drugs and alcohol, that he had been convicted of two felonies involving dishonesty, and that, in preparation for his testimony, the police and the prosecutor helped him piece together the details of the alleged transactions with Defendants. Sweeney also testified that he told the police that he would do whatever it took to alleviate the charges against his brother and that neither he nor his brother were prosecuted for their involvement with controlled substances. Defense counsel elicited testimony that Sweeney had trouble with his memory, that he became an informant for the money, that he bought drugs for personal use subsequent to conducting buys for the police, and that, initially, he did not inform Sergeant Quisenberry that he was buying drugs from the same dealers that he had set up for Quisenberry.

Sergeant Quisenberry was cross-examined about a false accident report, a disciplinary charge initiated by the Sheriff's Department in an unrelated matter, and accusations that he created false police reports in this case. He was asked about his failure to (1) obtain fingerprint evidence, (2) photocopy money used for the controlled buys, and (3) make an audiotape or videotape of the transactions with Defendants. Although Sergeant Quisenberry testified that law enforcement officers provided surveillance during the narcotics transactions, neither Quisenberry nor Sweeney knew of anyone who actually saw Sweeney receive narcotics from Defendants. Even Quisenberry, who provided surveillance on two occasions,

failed to observe Defendants provide Sweeney with cocaine. Because each witness's credibility was seriously questioned and because the state police report would have merely furnished additional bases on which to challenge the witnesses, the undisclosed evidence is deemed cumulative and not material. *Byrd v. Collins,* 209 F.3d 486, 518 (6th Cir. 2000) (quoting with approval *United States v. Avellino,* 136 F.3d 249, 257 (2d Cir. 1998)).

Second, the defense knew or should have known about the existence of the state police report. Petitioner alleges that the defense was unaware of the state police investigation concerning his prosecution. On June 18, 1999, however, Petitioner's attorney was quoted in an Oakland County newspaper article that stated the Michigan State Police were investigating Everingham's allegations. *See* Resp't App. F.[6] On the same day, the *Detroit Free Press* reported that the Michigan State Police were investigating Everingham's allegations that Sergeant Quisenberry lied and fabricated police reports in the case against Petitioner. *See id.* Furthermore, at trial, Petitioner's attorney cross-examined Sergeant Quisenberry about certain accusations that Quisenberry had created false police reports. (Tr. Oct. 22, 1999, at 209-12).

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[6] The article reported that Everingham recently denied witnessing a drug sale involving Petitioner. According to the article, Petitioner's attorney responded to the news in the following manner:

> As I've been saying all along, Mr. Puertas is not guilty and the events coming out now clearly show that. . . . The police are telling on the police and when it's all over, my client will be vindicated like we said from the beginning.

(Resp't App. F.)

Petitioner nevertheless alleges that the existence of the state police report did not become known until after the verdict, when a newspaper employee obtained part of the report and forwarded it to the defense. The fact that a newspaper employee was able to obtain part of the report illustrates that the report was "not wholly within the control of the prosecution." *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir. 1998). When the prosecution does not have complete control of information, *Brady* does not apply. *Id.*

Third, much of the information that Petitioner sought to use for impeachment purposes was available to the defense through transcripts of the preliminary examination or depositions taken in the civil forfeiture case against Petitioner. *See, e.g.,* Resp't App. G (transcript of Oakland County Deputy Sheriff Gary McClure's deposition in which McClure discusses untruthful information in search warrants, reports of surveillance when none was conducted, and the standard payment given to an informant for a controlled buy); Resp't App. H (transcript of Everingham's deposition, which includes comments about Sweeney's lack of credibility, Everingham not performing surveillance on August 26, 1997 despite the fact that the police report listed him as a surveillance officer on that date, falsification of overtime reports, Lieutenant Menghini's concerns about the case, and Sergeant Ahern's unwillingness to listen to Everingham's concerns); and Resp't App. J (transcript of Christopher Lanfear's deposition in which he explains the proper procedures for dealing with informants and execute search warrants). The United States Court of Appeals for the Sixth Circuit has stated that "[t]here is no *Brady* violation where a defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory information," or

where the evidence is available . . . from another source,' because in such cases there is really nothing for the government to disclose." *Coe,* 161 F.3d at 344 (quoting *United States v. Clark,* 928 F.2d 733, 738 (6th Cir. 1991)) (quoting *United States v. Grossman,* 843 F.2d 78, 85 (2d Cir. 1988)); *See also Spirko v. Mitchell,* 368 F.3d 603, 611 (6th Cir. 2004) (holding "that because the evidence was available to [the habeas petitioner] from other sources than the state, and he was aware of the essential facts necessary for him to obtain that evidence, the *Brady* rule does not apply").

Finally, the state police report was not entirely favorable to Petitioner. Had Petitioner introduced the state police report, the prosecutor could have pointed out that some of the people interviewed by the state police investigator contradicted Everingham's allegations of misconduct. Other interviewees noted that Everingham failed to raise his concerns about the case while the investigation of Petitioner was ongoing. Former NET commander Mark Menghini informed the state police investigator that Petitioner's defense team was "receiving help from within the Oakland County Sheriff's Department from current and former Deputies" and that "[t]he information [was] being twisted to damage the State's case whenever possible." *See* Pet'r App. at 57a. Menghini also stated that Everingham testified at the preliminary examination with the same information and passion that he reported throughout the investigation and that it was only after Everingham left the Sheriff's Department that he changed his story and committed perjury. (*Id.* at 58a). Retired Sergeant Mark Goodrich told the state police investigator that Everingham had informed him that Everingham planned to use Petitioner's case as leverage

against the Sheriff's Department. (*Id.* at 70a). The state police investigator ultimately concluded that Everingham's allegations concerning the search warrants and misconduct in the Sheriff's Department were unfounded.

In the words of the Michigan Court of Appeals,

> [w]hile there is much in the report that defendants could have used to impeach many government witnesses, this information must be balanced against the information within the report favorable to the prosecution. Chief among the information favorable to the prosecution are the multiple reports that Everingham was a less than responsible employee of the Sheriff's Department, that Everingham was suffering the consequences of a severe gambling problem, and, in conclusion, that Everingham's accusations pursuant to the Puertas investigation were "unfounded." Add to that the confirmation from Sweeney that he actually obtained cocaine from defendants at the Megabowl on six occasions, and the report, considered in total, is indeed a double-edged sword.

Puertas, Mich. Ct. App. No. 224173, at 6 n.8.

This Court agrees with the Michigan Court of Appeals that there is not a reasonable probability that the result of the proceeding would have been different had the state police report been disclosed before trial. Disclosure of the disputed evidence would not have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435. Therefore, Petitioner has not satisfied all three components of a *Brady* claim, and the refusal by the Michigan Court of Appeals to grant

relief on this claim was not contrary to or an unreasonable application of clearly established federal law.

B. The Prosecutor's Statements

The second habeas claim attacks the prosecutor's remarks during closing arguments. Petitioner alleges that the prosecutor argued facts not of record, commented on Petitioner's failure to testify, denigrated the defense, and encouraged the jury to convict Petitioner in order to protect the community.

For habeas relief to be granted, prosecutorial misconduct must have infected the trial with such unfairness as to make the resulting conviction a denial of due process. *Byrd,* 209 F.3d at 529 (quoting *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974))). "To constitute a denial of due process, the misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* (quoting *Pritchett v. Pitcher,* 117 F.3d 959, 964 (6th Cir. 1997)). In addition, prosecutorial misconduct may be reviewed for harmless error. *Mason v. Mitchell,* 320 F.3d 604, 635 (6th Cir. 2003) (citing *Hill v. Brigano,* 199 F.3d 833, 847 (6th Cir. 1999)). The Court is mindful that the Sixth Circuit "has been reluctant to grant habeas petitions based on improper prosecutorial statements at closing argument." *Wilson v. Mitchell,* 250 F.3d 388, 399 (6th Cir. 2001).

1. Arguing Facts not in Evidence

During his rebuttal argument, the prosecutor suggested that Petitioner planted a bag of harmless white

power [sic] in a safe as an insult to the police. The prosecutor stated, "I'll tell you what this bag of white powder is right here. This bag of white powder, which is not a controlled substance, but is in the safe, is a dig from that man who knew we were coming and that's why this is in here." (Tr. Oct. 28, 1999, at 265). Petitioner contends that the comment was not supported by the evidence and that it implied he was a drug dealer, who hid evidence from the police and substituted white powder in its place. The trial court opined that the comment was improper, but not a basis for a mistrial. (Tr. Oct. 29, 1999, at 14-15). The Michigan Court of Appeals likewise determined that the comment did not warrant relief.

The Supreme Court has stated that prosecutors may not make improper suggestions, insinuations, or assertions and that they have a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States,* 295 U.S. 78, 88 (1935). Additionally, "[s]tatements by a prosecutor in a closing argument are not proper if they bring to the attention of the jury facts not in evidence." *United States v. Emuegbunam,* 268 F.3d 377, 404 (6th Cir. 2001), *cert denied,* 535 U.S. 977 (2002).

The evidence in this case established that Petitioner sold cocaine to Sweeney and that dogs alerted to Petitioner's closed safes, despite the fact that no drugs were found there. Moreover, the day manager of the Megabowl testified that she never saw white powder in the safe and that she kept her white exercise supplement in a desk drawer, not the safe. (Tr. Oct. 28, 1999, at 46-47, 51, 77-78, 82). A reasonable inference from the evidence was that Petitioner suspected a police raid, removed cocaine from the safes, and substituted a harmless white power [sic] for

the cocaine. As the Sixth Circuit has stated, "counsel must be given leeway to argue reasonable inferences from the evidence." *United States v. Collins,* 78 F.3d 1021, 1040 (6th Cir. 1996). Therefore, the conclusion of the Michigan Court of Appeals that the comment did not warrant relief was not contrary to, or an unreasonable application of, Supreme Court decisions concerning prosecutorial misconduct.

2. Comment on Failure to Testify

Immediately before or during an argumentative bench conference, the prosecutor apparently asked defense counsel whether his client was going to take the stand or why he did not take the stand. The comment was not transcribed by the court reporter, but on the following day, defense counsel informed the trial court that he had heard the remark when he played a tape recording of the proceedings. Defense counsel admitted that he did not hear the comment when it was made, but he claimed that someone in the audience had heard the remark and he thought that the jury had heard it. The trial court said that it had not heard the comment, and the prosecutor maintained that his remark had not been loud enough for the jury to hear. (Tr. Oct. 29, 1999, at 3-4, 6-7, 13-14). Petitioner contends that the prosecutor's comment was an improper reference to his failure to testify. The Michigan Court of Appeals adjudicated Petitioner's claim and denied it.

The Fifth Amendment states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment is applicable to the states, and has been interpreted as

forbidding comments on a defendant's silence. *Griffin v. California,* 380 U.S. 609, 615 (1965).

The record indicates that the prosecutor was making his closing argument when defense counsel objected to something the prosecutor said. The trial court consequently advised the attorneys to approach the bench. Petitioner then got out of his chair and said that "they" had been lying and that he could not take these lies anymore, or something to that effect. The prosecutor allegedly turned to Petitioner's attorney with his back to the jury and said, "Is Mr. Puertas going to take the stand?" (Tr. Nov. 17, 1999, at 24-25).

Neither defense counsel nor the trial court heard the remark, and the trial court doubted that the jury heard it because of all the yelling that was going on when the remark was made. The trial court described the comment as something like, "Is Mr. Puertas going to testify?" The trial court noted that the jurors were questioned repeatedly during *voir dire* on whether they understood that a defendant does not have to take the stand and, if he does not testify, the jurors could not hold it against him. (Tr. Oct. 29, 1999, at 13-14).

The trial court subsequently charged the jury that every defendant has an absolute right not to testify and that the jurors should not consider the fact that Defendants did not testify. The court specifically instructed the jurors that the failure to testify must not affect their verdict in any way. (*Id.* at 22). Earlier, before any testimony was taken, the trial court had instructed the jurors that the defense did not have to offer any evidence and that the jurors should pay no attention to discussions

which occurred between the attorneys and the court out of their hearing. (Tr. Oct. 12, 1999, at 5, 9-10).

This Court concludes that the prosecutor's comment could not have had a "substantial and injurious effect or influence" on the jury's verdict and was harmless. *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993). The jurors likely did not hear the remark, and even if they did hear it, they were instructed not to consider Petitioner's failure to testify. Therefore, the state appellate court's conclusion that relief was not warranted did not result in a decision that was contrary to or an unreasonable application of *Griffin.*

3. Denigrating the Defense

Petitioner next argues that the prosecutor denigrated the defense by suggesting that defense counsel was trying to mislead the jury. Petitioner notes that the prosecutor accused defense counsel of distracting the jury with "smoke and haze," "sound and fury," "bombastic antics," and innuendo. (Tr. Oct. 28, 1999, at 165-66, 173-74). The prosecutor also said that Defendants had tried to create a defense where none existed. (*Id.* at 264).

Although prosecutors may not make "unfounded and inflammatory attacks on the opposing advocate," *United States v. Young,* 470 U.S. 1, 9 (1985), the Michigan Court of Appeals determined on review of Petitioner's claim that Petitioner forfeited the issue by not objecting to the comments during trial. The Sixth Circuit has stated that if "a habeas petitioner fails to obtain consideration of a claim by a state court . . . due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and

may not be considered by the federal court on habeas review." *Seymour v. Walker,* 224 F.3d 542, 549-50 (6th Cir. 2000) (citing *Wainwright v. Sykes,* 433 U.S. 72, 80, 84-87 (1977); *Picard v. Connor,* 404 U.S. 270, 275-80 (1971)). Procedural default requires three elements: "(1) the petitioner failed to comply with a state procedural rule that is applicable to the petitioner's claim; (2) the state courts actually enforced the procedural rule in the petitioner's case; and (3) the procedural forfeiture is an 'adequate and independent' state ground foreclosing review of a federal constitutional claim." *Willis v. Smith,* 351 F.3d 741, 744 (6th Cir. 2003) (citing *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986)).

Petitioner failed to comply with a state procedural rule that requires defendants to preserve their claims for appellate review by raising them in the trial court. *See People v. Carines,* 460 Mich. 750, 761-62, 597 N.W.2d 130, 137 (1999); *People v. Grant,* 445 Mich. 535, 546, 520 N.W.2d 123, 128 (1994). The last state court to review Petitioner's claim in a reasoned opinion was the Michigan Court of Appeals. It enforced the state procedural rule when it stated, "this claim of error is forfeited." *Puertas,* Mich. Ct. App. No. 224173, at 17. The state court's alternative holding that Petitioner's argument also failed on its face does not preclude this Court from concluding that Petitioner's claim is procedurally defaulted. *Harris v. Reed,* 489 U.S. 255, 264 n.10 (1989). The contemporaneous-objection rule was an adequate and independent state ground for the state court's decision because the rule was "firmly established and regularly followed" when it was applied. *Rogers v. Howes,* 144 F.3d 990, 992 (6th Cir. 1998) (quoting *Ford v. Georgia,* 498 U.S. 411, 423-24 (1991)).

Thus, all three elements of procedural default are satisfied.

The Court may excuse a petitioner's procedural default only if he demonstrates cause for the default and prejudice attributable thereto or that a fundamental miscarriage of justice will occur if the Court fails to consider the federal claim. *Coleman v. Thompson,* 501 U.S. 722, 749-50 (1991). Petitioner implies that an objection would have highlighted the error and that a cautionary instruction would have been ineffective. Defense counsel, however, could have objected at a bench conference or in the jury's absence, and a timely cautionary instruction likely would have been effective, as juries are presumed to follow their instructions. *Richardson v. Marsh,* 481 U.S. 200, 211 (1987). The Court therefore concludes that Petitioner has failed to show cause for his failure to object to the allegedly denigrating remarks.

Because Petitioner failed to establish cause to excuse his procedural default, the Court need not determine if Petitioner has been prejudiced. *Willis,* 351 F.3d at 746 (citing *Simpson v. Jones,* 238 F.3d 399, 409 (6th Cir. 2000)) (citing *Smith v. Murray,* 477 U.S. 527, 533 (1986); *Long v. McKeen,* 722 F.2d 286, 289 (6th Cir. 1983)). Furthermore, the exception for miscarriages of justice does not apply because Petitioner has not submitted any new and reliable evidence of actual innocence. *Id.* (citing *Schlup v. Delo,* 513 U.S. 298 (1995)). Accordingly, Petitioner's claim about denigrating the defense is procedurally defaulted.

4. The Alleged Civic Duty Argument

Petitioner's final allegation about the prosecutor's statements is that the prosecutor encouraged the jury to

convict Petitioner in order to protect the community. The Michigan Court of Appeals did not discuss this claim, although Petitioner raised it in his appellate brief. Because no state court analyzed the claim, this Court must review the claim *de novo*. *Maples v. Stegall*, 340 F.3d 433, 436-37 (6th Cir. 2003) (citing *Wiggins v. Smith*, 123 S.Ct. 2527, 2542-44 (2003)).

The Court looks to *Viereck v. United States*, 318 U.S. 236 (1943), as a guide for determining whether a prosecutor intended his comments to incite prejudice and passion in the jury. *Emuegbunam*, 268 F.3d at 406. The prosecutor in *Viereck* exhorted the jury as follows:

> In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps. This is war. It is a fight to the death. The American people are relying on you ladies and gentlemen for their protection against this sort of a crime, just as much they are relying upon the protection of the Men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> As a representative of your Government I am calling upon every one of you to do your duty.

Viereck, 318 U.S. at 247 n.3.

In contrast, the prosecutor at Petitioner's trial said to the jury:

> After this case is done and then you are able to go home and talk to your loved ones about what the case was about or your neighbors or whoever it is and you get there and you're in your backyard and you're leaning over the fence and you're talking to your neighbor and you say, yep, I just got done with this jury duty and we had this very interesting case. It was a drug case and a racketeering case and a conspiracy case and the Prosecutor had the actual person who bought the drugs from the two defendants and he had officers who actually witnesse[d] the transactions happen and they had $106,000.00.
>
> . . . .
>
> And they had $106,000 of drug tainted money. Drug dogs alerted to the safes where the money was kept. And you turn to your neighbor and your neighbor says, well what happened? And you say well we found him not guilty. And your neighbor says what?

(Tr. Oct. 28, 1999, at 267-68). These remarks do not rise to the level of the argument made in *Viereck*. The prosecutor's statements in this case list the evidence against Petitioner and appeal more to the jury's common sense than to the jury's fear of community safety.

Furthermore, the trial court sustained defense counsel's objection and then instructed the jurors not to consider the remarks about any discussion they might have with their neighbors. (Tr. Oct. 28, 1999, at 270). The alleged error was cured when the trial court struck the remark from the record and instructed the jury to disregard it. *See Marsh,* 481 U.S. at 211 (noting that juries are presumed to follow their instructions); *United States v. Roberts,* 986 F.2d 1026, 1031 (6th Cir. 1993) (stating that

"the prejudicial effect of improper comments may be negated by curative instructions to the jury"). Petitioner has no right to habeas relief on the basis of his "civic duty" claim because the alleged prosecutorial misconduct did not infect Petitioner's trial with such unfairness as to deprive Petitioner of due process.

C. Jury Instructions on Missing Evidence

Informant Sweeney made controlled buys of narcotics for the police in Pontiac, Michigan on August 7 and 12, 1997. Sweeney alleged that he did this to avoid having his younger brother prosecuted for violating the state's narcotics laws. At trial, defense counsel asked the prosecution for copies of the affidavits that were prepared as support for the search warrants in the Pontiac cases. The prosecution maintained throughout trial that it was unable to locate the affidavits, despite diligent efforts. Defense counsel finally asked the trial court "for some kind of instruction to the jury" on the missing affidavits. (Tr. Oct. 19, 1999, at 8). The trial court refused to give the instruction, but it permitted defense counsel to make the argument to the jury. (Tr. Oct. 28, 1999, at 143).

Petitioner claims that he was entitled to an instruction that the prosecution failed to preserve the affidavits and that the jury could infer the evidence would have been favorable to the defense. Petitioner asserts that the affidavits would have provided additional information on the working relationship between Sweeney and law enforcement officials and on Sweeney's reliability or credibility. The Michigan Court of Appeals concluded on review of Petitioner's claim that the trial court properly

denied Petitioner's request for a jury instruction on the issue.

The question on habeas review is whether the allegedly defective jury instructions "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten,* 414 U.S. 141, 147 (1973). A federal court may not grant the writ of habeas corpus on the basis that a jury instruction was incorrect under state law. *Estelle v. McGuire,* 502 U.S. 62, 71-72 (1991). Furthermore, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe,* 431 U.S. 145, 155 (1977). It is also well established that the jury instructions must be considered as a whole. *McGuire,* 502 U.S. at 72.

The disputed affidavits were not prepared for this case; they were submitted in unrelated criminal matters. They pertained to other parties, other locations, and other dates, and they were prepared before the police asked Sweeney to work with them on an investigation of Petitioner. Furthermore, the two defense attorneys were given ample opportunities to cross-examine Sweeney and Sergeant Quisenberry regarding Sweeney's reliability and credibility.

The Court concludes that the lack of a jury instruction on the missing affidavits did not deprive Petitioner of due process or a fair trial. Therefore, the trial court's refusal to give the requested instruction, and the state appellate court's conclusion that the trial court did not abuse its discretion, did not result in decisions that were contrary to, or an unreasonable application of, Supreme Court precedent.

D. Dog Sniff Evidence

The fourth and final habeas claim pertains to the admission of evidence that specially trained dogs reacted to the odor of narcotics during a search of the Megabowl and Petitioner's storage facility. When adjudicating this claim, the Michigan Court of Appeals explained that

> [t]wo dogs trained to alert to the scent of narcotics were utilized during the execution of the search warrants. The prosecutor offered four witnesses relative to these dogs. Two witnesses, Dr. Stefan Rose, M.D. and Dr. Kenneth G. Furton, Ph.D. (the forensic experts), were qualified by the Court to offer expert opinions relating to what caused the dogs to alert to safes that contained currency but no illegal narcotics and to opine about the adequacy of the training of the dogs. Defendants objected to these witnesses both by way of a pretrial motion and at trial when the witnesses were called to testify. The prosecution also called two witnesses charged with handling the dogs (the canine patrol officers). Each canine patrol officer testified to the training of his particular dog and to the fact that his dog had alerted to one or more safes located on the searched premises. Although no narcotics were found in the safes to which each dog alerted, the witnesses were permitted to opine that narcotics must have recently been inside the safes in order to cause the dogs to alert. Defendants objected during trial to the testimony of these witnesses. Defendants sought a special limiting instruction relating to the drug-sniffing dog evidence. The trial court denied defendants' request for a special instruction.

Puertas, Mich. Ct. App. No. 224173, at 10.

1. Admission of the Evidence

Petitioner alleges that the "dog sniff" evidence had little or no probative value. The Michigan Court of Appeals, however, concluded that the trial court did not abuse its discretion in admitting the evidence and that any prejudice resulting from admission of the evidence did not substantially outweigh its probative value.

The Sixth Circuit has stated that "errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, [usually may not] be questioned in a federal habeas corpus proceeding." *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988). "Trial court errors in state procedure and/or evidentiary law do not rise to the level of federal constitutional claims warranting relief in a habeas action unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment." *McAdoo v. Elo,* 346 F.3d 159, 165-66 (6th Cir. 2003) (citing *McGuire,* 502 U.S. at 69-70).

Petitioner relies on scientific findings that a large percentage of United States currency is tainted with cocaine. Although he did not produce any evidence to support this theory at trial, "the prosecution's expert substantiated this claim for [him]." *Puertas,* Mich. Ct. App. No. 224173, at 11 n.13. As Petitioner was able to present this theory at trial, the admission of "dog sniff" evidence did not deprive Petitioner of a fair trial.

Furthermore, Petitioner has not cited any Supreme Court decision that prohibits the use of "dog sniff" evidence on constitutional grounds. *But see, United States v. Buchanan,* 213 F.3d 302, 315-18 (6th Cir. 2000) (Jones, J., concurring); *People v. Humphreys,* 221 Mich. App. 443,

447-49, 561 N.W.2d 868, 869-71 (1997). Therefore, the decisions of the trial court and the state appellate court were not contrary to or an unreasonable application of any Supreme Court decision.

2. Refusal to Give a Cautionary Instruction

Petitioner also contends that the trial court should have given a cautionary instruction on "dog sniff" evidence and that the failure to do so deprived him of his right to a properly instructed jury. The cautionary instruction would have warned the jurors to consider drug sniffing evidence with great care. The instruction also would have stated that the evidence has little value as proof and that, if the jurors decided the evidence was reliable, they must not convict either defendant solely on drug sniffing evidence. (Tr. Oct. 28, 1999, at 114).

As discussed above, the question on habeas review is whether the allegedly defective jury instructions "so infected the entire trial that the resulting conviction violates due process." *Naughten,* 414 U.S. at 147. A federal court may not grant the writ of habeas corpus on the basis that a jury instruction allegedly was incorrect under state law, *McGuire,* 502 U.S. at 71-72, and "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Kibbe,* 431 U.S. at 155.

The Michigan Court of Appeals agreed with Petitioner that the trial court should have given the limiting jury instruction requested by Petitioner. The Michigan Court of Appeals concluded, however, that the omission did not result in a miscarriage of justice. In reaching this conclusion, the court noted that

> [t]he evidence relating to the drug-sniffing dogs, standing alone, could not establish the crimes of which [Petitioner was] convicted. An essential element to the charge of delivering cocaine is evidence of the intent to deliver. This evidence was established through the evidence of narcotic sales at the Megabowl, as demonstrated by the controlled buys executed by Sweeney. Likewise, the crime of operating a criminal enterprise is not established merely by evidence of possession of illegal narcotics and large amounts of cash. Rather, the prosecution was required to prove that [Petitioner was] employed or associated with the Megabowl and knowingly participated in the affairs of the Megabowl through a "pattern of racketeering activity" as that term is defined by Mich. Comp. Laws § 750.159f(c). This pattern of racketeering activity was established by the evidence of multiple sales of narcotics from behind the business counter of the Megabowl.[7]

Puertas, Mich. Ct. App. No. 224173, at 13-14 (internal footnote omitted, end footnote in original). The Michigan Court of Appeals concluded that the evidence was not a controlling issue, but merely circumstantial evidence that corroborated the six controlled buys of illegal narcotics.

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[7] Moreover, the jury was charged with a cautionary instruction relating to the value and proper use of expert testimony. Because a great deal of the evidence relating to the activities of the drug-sniffing dogs came in through experts, we must presume that the jury considered this testimony in light of the court's expert testimony instruction. Jurors are presumed to follow their instructions. [*People v.*] *Graves,* [458 Mich. 476, 486, 581 N.W.2d 229 (1998)]. While the expert witness charge does not cover all of the issues addressed in CJI 2d 4.14, it nonetheless ensured that the jury considered whether the experts' testimony made sense when considered in conjunction with all the other evidence presented in the case.

This Court concludes for the reasons given by the Michigan Court of Appeals that the lack of a jury instruction on "dog sniff" evidence did not deprive Petitioner of a fair trial. Consequently, the state court's failure to grant relief did not result in a decision that was contrary to or an unreasonable application of *Naughten*.

IV. CONTINUATION OF BOND

Pursuant to an order of this Court, Petitioner presently remains on bond. This order provided that:

> If this Court denies Petitioner's petition for a writ of habeas corpus or otherwise terminates these proceedings, and Petitioner seeks further review of the Court's decision, *this Court's July 17, 2003 bond order shall remain in effect for a period of 45 days after such decision denying the petition or terminating these proceedings, or until such time as this Court or an appellate court determines Petitioner's eligibility for bond pending further review pursuant to Federal Rule of Appellate Procedure 23(b).* If Petitioner does not obtain bond pending further review of his petition for a writ of habeas corpus or does not appeal the decision denying the petition or otherwise terminating these proceedings, Petitioner will surrender himself to the Oakland County Sheriff or other custodial authority, as directed by the Oakland County Circuit Court.

Aug. 19, 2003 Order at 1-2. The Court added this 45 day period "to provide the Court and the parties with a brief period of time following a denial of the petition to assess Petitioner's eligibility for bond on appeal." Aug. 14, 2003 Order at 8. If Petitioner seeks further review of the Court's decision and a continuation of bond, Petitioner shall file a

motion for bond within ten (10) days of the filing of the notice of appeal. Respondents shall file a response brief within seven (7) days of the service of that motion. Petitioner may file a reply brief within five (5) days of the service of the response. If Petitioner chooses to file such a motion for bond pending appeal, the Court reiterates that the July 17, 2003 bond order shall remain in effect until the motion for bond pending appeal is decided, even if that period is longer than 45 days, in accordance with the Court's orders of August 14 and 19, 2004.

V. CERTIFICATE OF APPEALABILITY

The Court also determines that it is appropriate to address the issue of a certificate of appealability at this time. Although the Court determines that Petitioner is not entitled to a writ of habeas corpus, the Court considers the issues raised to be of such a sort "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880 at 893, n. 4 (1983)). Accordingly, the Court will grant a certificate of appealability to Petitioner on all issues.

VI. CONCLUSION

For the reasons stated above, the Court concludes that Petitioner is not entitled to the writ of habeas corpus. **ACCORDINGLY, IT IS HEREBY ORDERED** that his petition for a writ of habeas corpus [docket entry 1] is **DENIED**.

IT IS FURTHER ORDERED that a Certificate of Appealability shall issue for all issues raised by Petitioner.

IT IS FURTHER ORDERED that, in accordance with this Court's orders of August 14 and 19, 2003, the July 17, 2003 bond order shall remain in effect for a period of 45 days after the entry of this order, or until such time as this Court or an appellate court determines Petitioner's eligibility for bond pending further review pursuant to Federal Rule of Appellate Procedure 23(b).

IT IS FURTHER ORDERED that if Petitioner seeks further review of the Court's decision and a continuation of bond, Petitioner shall file a motion for bond within **TEN (10) DAYS** of the filing of a notice of appeal. Respondents shall file a response brief within **SEVEN (7) DAYS** of service of Petitioner's motion. Petitioner may file a reply brief within **FIVE (5) DAYS** of the service of the response.

Dated: October 19, 2004

s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH EDMUND PUERTAS,

Petitioner

v.

WILLIAM OVERTON, Director, Michigan Department of Corrections, NICK LUDWICK, Warden, Egeler Reception and Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County,

Respondents. /

Civil Case Number: 03-40157

HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

JUDGMENT

The above entitled matter having come before the Court on a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, the Honorable Paul V. Gadola presiding, the issues having been fully presented, the Court being fully advised in the premises, and a ruling having been duly rendered, **IT IS ORDERED AND ADJUSTED** that Petitioner is entitled to **NO RELIEF** and that this action be, and the same hereby is, **DISMISSED WITH PREJUDICE.**

Dated at Flint, Michigan, this 19th Day of October, 2004.

DAVID WEAVER
CLERK OF THE COURT

BY: s/ Ruth A. Brissaud
Deputy Clerk

APPROVED:

s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,	Case No. 98-157485-FH Case No. 98-157489-FH
Plaintiff,	Hon. Colleen O'Brien
v	
JOSEPH EDMUND PUERTAS, and JAMES MICHAEL TALLEY,	
Defendants. /	

OPINION AND ORDER

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan on May 08, 2000, 2000

PRESENT: Hon. Colleen O'Brien, Circuit Judge

This matter is before the Court on Defendants' Motion for New Trial and Request for Order of Dismissal.[1] The instant motion and request arises out of a series of events which culminated in the conviction of Defendants.

On November 1, 1999 a jury found Defendant Puertas guilty of conspiracy to deliver 50 to 225 grams of a controlled substance, guilty of six deliveries of less than 50 grams of cocaine, and guilty of conducting a criminal enterprise. Defendant Talley was found guilty by jury of

[1] Defendant Puertas has brought the instant motion and request for dismissal joined in by Defendant Talley.

three deliveries of less than 50 grams of cocaine, guilty of conducting a criminal enterprise, and not guilty of conspiracy.[2]

Following their convictions, Defendants filed a Motion for New Trial. This Court denied Defendants' Motion for New Trial. On December 2, 1999, Defendant Puertas was sentenced to serve seven (7) consecutive sentences with a combined term of fourteen (14) years in prison. Defendant Talley was placed on probation. Subsequently, Defendants filed a Motion for Discovery which was granted by this Court on March 27, 2000.

The present motion and request for dismissal follows this Court's earlier decision on Defendants' Motion for Discovery. Such decision found that certain documents should have been turned over to Defendants. Specifically, this Court rules that a full un-redacted copy of a report prepared by the Michigan Department of State Police should be disclosed to the defense based on *Brady v. Maryland*, 373 US 83; S Ct 1194; 10 L Ed 2d 215 (1963); *Kyles v. Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995) and a previous Order Granting Motion for Additional Discovery entered by Judge Jourdan on June 10, 1998. It is the full un-redacted report that comprises the basis for Defendants' motion now before this Court.

The aforesaid report was generated as a result of an independent Michigan State Police investigation of allegations of misconduct in this case brought by former Oakland County Sheriff's Department Deputy Kenneth Everingham. As the prosecution points out, this Court has

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[2] The conspiracy count was later dismissed by this Court.

already found that approximately half of the Michigan State Report is not grounds for granting Defendants a new trial. Their contention is based upon this Court's earlier denial of Defendants' first motion for new trial prior to sentencing. However, at the time of the first motion for new trial, this Court had only a redacted version of the Michigan State Police Report for its review. Before this Court now is the entire 31-page unredacted police report. It does not follow that this Court's decision as to the entire report is constrained by this Court's earlier decision based on only a portion of the report. Materiality of suppressed evidence is to be considered collectively. *Kyles, supra*, 514 US at 437.

This Court has already determined that Defendant is entitled to the disclosure of the police reports generated in this case, and that the prosecution had an obligation to provide that information. It is now Defendants contention that the prosecution's failure to provide discovery requires the granting of a new trial.

This Court has the discretion to resolve questions involving the noncompliance with discovery orders. MCR 6.201 provides that where the prosecution has failed to comply with discovery requirements that the court "in its discretion, may order that testimony or evidence be excluded, or may order another remedy." In determining the applicable remedy, the Court must balance the interests of the public, the parties and the courts in determining the appropriate remedy. See *People v. Taylor*, 159 Mich App 468 (1987), lv den 428 Mich 913 (1987).

Defendants argue the withholding of the police report constitutes constitutional error and requires the granting of a new trial. Pursuant to *Brady*, "the suppression by the

prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

The prosecution argues that Defendants cannot establish a *Brady* violation. In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v. Fox* (After Remand), 232 Mich App 541, 549 (1998, lv den 461 Mich 900 (1999).

As to the first element, the prosecution contends that the state did not possess evidence favorable to the Defendant or suppress any such evidence. However, based on *Kyles*, the prosecution has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police. *Kyles, supra*, 514 US at 437-438.

Nor is this Court persuaded by the prosecution's argument that because the report found Everingham's allegation unfounded and because nothing in the report would have assisted the defendant that the report does not constitute evidence favorable to the defendants. First, the report is not solely relevant to Everingham's allegations. The impact of the report brings into question the procedures used in the investigation and the credibility of those involved. In particular, this Court notes the statement

attributed to Sgt. Quisenberry by Lt. Mark Menghini (the former commander of NET) stating that the way things were presented in the reports were not as they were observed.[3] As the parties are aware, Sgt. Quisenberry's testimony and credibility were crucial during trial.

In addition, the prosecution contends that Defendants were aware, or should have been aware of most, if not all, the evidence contained in the Michigan State Police report. This Court agrees that certain material from the Michigan State Police report was not unknown to Defendants, particularly the concerns voiced by former Oakland County Deputy Sheriff Kenneth Everingham. However, the emphasis for ascertaining a *Brady* violation is upon the materiality of the withheld information. A defendant need not show that after considering the undisclosed evidence, there would not have been enough evidence left to convict. *Kyles, supra*, 514 US at 434. The key is whether the excluded evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*

Furthermore, while the prosecution points out examples in the report that either were already known to the defense or most likely would be inadmissible, this Court is to view the evidence collectively. *Kyles, supra*, 514 US at 437. In viewing the entire report, this Court finds that had the information in the report been previously available to Defendants, there is a reasonable probability that the result of the proceeding would have been different. Accordingly, this Court finds the withholding of such report constitutes a *Brady* violation. This Court does not find, as

[3] Report of 7/26/99 p. 1.

argued by the prosecution, that even if there were a *Brady* violation, it was harmless error.

Because there was a violation of the trial court's discovery error, this Court may fashion an appropriate remedy. *Taylor, supra* at 487. This Court recognizes the enormous expenditure of time and resources over the course of the prior lengthy trial. In particular, this Court recognizes the efforts expended by the members of the prior jury. However, this Court finds that the appropriate remedy here, in light of the guidelines set forth in *Taylor*, is to grant Defendants' Motion for a New Trial. Therefore, this Court finds that dismissal is not warranted.

In summary: Defendants' Motion for New Trial is granted; the convictions of Defendants are set aside; bond is reinstated; and Defendants' Request for Dismissal is denied.

IT IS SO ORDERED.

/s/ Colleen A. O'Brien
Colleen A. O'Brien, Circuit Judge

No. 04-2405

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH EDMUND PUERTAS, Petitioner-Appellant, v. WILLIAM OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., Respondents-Appellees	)	ORDER

(Filed Jul. 13, 2006)

BEFORE: MERRITT, MOORE AND SUTTON, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Michigan Department of State Police
ORIGINAL INCIDENT
REPORT

	ORIGINAL DATE Tue. Jan. 29, 1999	INCIDENT NO. COC-0000046-99	
	TIME RECEIVED 1058	FILE CLASS 50000	
	WORK UNIT MSP Criminal Invest SE#3	COUNTY Oakland	
COMPLAINANT MICHIGAN STATE POLICE		TELEPHONE NO	
ADDRESS: STREET AND NO. 18050 DEERING STREET	CITY LIVONIA	STATE MI	ZIP CODE 48152-
INCIDENT STATUS Open			

POSSIBLE PUBLIC CORRUPTION

VENUE:

OAKLAND COUNTY, PONTIAC
1200 N TELEGRAPH RD

DATE & TIME:

ON OR AFTER: WED, AUG 20, 1997 AT 1200 AND BEFORE: WED, JUN 02, 1999 AT 1200

COMPLAINANT:

NAM: MICHIGAN STATE POLICE

		RAC: U	ETH: U
NBR: 18050	DIR:	SEX: U	OPS:
STR: DEERING		DOB:	SSN:
SFX: STREET		HGT:	SID:

CTY: LIVONIA	ST: MI	WGT:	FBI:
TXH:	ZIP: 48152	HAI:	MNU:
TXW: 734/525-2560		EYE:	PRN:

INFORMATION:

On June 29 1999, the undersigned officer was assigned to investigate a report of false information that was used to secure a search warrant involving NET complaint # 975-2309-97, (Joseph E. PUERTAS investigation), the allegation is being brought by Former Oakland County Sheriff's Department Deputy KENNETH EVERINGHAM. EVERINGHAM is now reporting that Oakland County Sheriff's Department SGT. KENNETH QUISENBERRY obtained Search Warrants with falsified information, lied about surveillance and Overtime. Both EVERINGHAM and QUISENBERRY were assigned to the Homicide Task Force during the time in question. The Homicide Task Force was housed at the NET office in Pontiac.

Information was also received reporting that former Deputy EVERINGHAM was contacting the FBI to make a formal complaint about the lies that were used to secure search warrants. It was also reported that EVERINGHAM was making a statement to the news media and talking with defense attorneys who are representing Joseph E. PUERTAS. FBI S/A Tony Sano, Detroit Office, 313/237-4257, Pager 313/684-0424 has been assigned this investigation for the FBI.

PAGE	INVESTIGATED BY	REPORTED BY	REVIEWED BY
1 of 4	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

Michigan Department of State Police
ORIGINAL INCIDENT
REPORT

ORIGINAL DATE	INCIDENT NO.
Tue. Jan. 29, 1999	COC-0000046-99
TIME RECEIVED	FILE CLASS
1058	50000

CONTACT FEDERAL BUREAU OF INVESTIGATIONS:

On June 21, 1999 at approximately 1:00PM, the undersigned officer discussed this case with S/A Sano via telephone. It was agreed that the FBI would assist wherever and whenever possible and since EVERINGHAM approached the FBI with the complaint. It was reported that EVERINGHAM was previously polygraphed with the questions centering around some overtime and surveillance issues. It was agreed that the FBI would attempt to set up a polygraph for EVERINGHAM regarding the allegations of false information used to obtain search warrants. S/A Sano also stated that he has a little paperwork regarding this investigation and that he would make arrangements to share this information.

CONTACT D/LT. RICHARD TORONGEAU:

On June 23, 1999 at approximately 2:20PM, the undersigned officer had a telephone conversation with D/Lt. RICHARD TORONGEAU, Acting NET Commander. At this time, D/Lt. TORONGEAU advised the undersigned that he is fully cooperating with the Prosecutors Office, Oakland County Sheriff's Department and the Local FBI. It was reported that Former Deputy EVERINGHAM and Sgt. QUISENBERRY are assigned by the Sheriff's Department to the Homicide Task Force and are not assigned

to NET. D/Lt. TORONGEAU also advised that NET adopted this investigation because of the Narcotic's involvement.

D/Lt. TORONGEAU informed the undersigned that he will pull together the NET report 975-2309-97, copies of the executed search warrants on the PUERTAS case, and any other documents that maybe [sic] available which involve this case.

D/Lt. TORONGEAU informed this officer that Ken EVERINGHAM terminated his employment with the Oakland County Sheriff's Department in early June of this year. It was reported that EVERINGHAM was unhappy with being reassigned to the jail during an internal investigation regarding EVERINGHAM'S misuse of a Sheriff's Department vehicle.

On June 24, 1999 at approximately 3:00PM, the undersigned met with D/Lt. TORONGEAU. At this time, the undersigned was provided with a complete copy of the NET report 975-2309-97; a copy of a civil law suit filed by Attorney Fred Gibson on behalf of his client Ken EVERINGHAM (against Assistant Oakland County Prosecutor James L. Halushka and Oakland County Sheriff's Department Under Sheriff Thomas QUISENBERRY) and copies of overtime records from the Sheriff's Department and NET.

CONTACT OAKLAND COUNTY PROSECUTORS OFFICE:

On June 28, 1999 at approximately 10:15AM, the undersigned officer met with APA Gary Tunis of the Oakland County Prosecutor's Office. At this time APA Tunis provided the undersigned with copies of all the search warrants that

were executed regarding the PUERTAS investigation (975-2309-97). APA Tunis also provided the undersigned with a copy of the transcript for the testimony of former Deputy Ken EVERINGHAM taken during the District Court Examination on the Joseph E. PUERTAS case (975-2309-97).

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2 of 4	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

Michigan Department of State Police
ORIGINAL INCIDENT REPORT

ORIGINAL DATE	INCIDENT NO.
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APA Tunis stated that he directly recalls interviewing Ken EVERINGHAM on 06/29/98. During this interview, EVERINGHAM stated that he recalls being present on August 26, 1997 with Sgt. QUISENBERRY and Deputy Chris Yuchaz and conducted surveillance on the C/I at the Mega Bowl. This statement is consistent with what Ken EVERINGHAM testified to at the Examination. APA Tunis reports EVERINGHAM has now testified at a deposition that on August 26, 1997 he was not present at all. EVERINGHAM states that Sgt. QUISENBERRY told him about the investigation and to put in for the Over-time.

CONTACT OAKLAND COUNTY SHERIFF'S DEPARTMENT:

On June 29, 1999 at approximately 8:00AM, the undersigned officer met with Oakland County Sheriff's Department Captain Mike McCabe at the Sheriff's Department. Capt. McCabe informed the undersigned that Ken EVERINGHAM was overall a good employee. The Sheriff's Department had conducted an internal investigation regarding concerns that EVERINGHAM was using his Department vehicle for personal use and that he lost his issued Departmental weapon without reporting it.

It is the belief of the Sheriff's Department that they had plenty of evidence to have EVERINGHAM terminated. A decision was made to have EVERINGHAM demoted from Deputy II to Deputy I and assigned to the County Jail. EVERINGHAM was openly upset over being assigned to the jail and filed for Workers Compensation. Request siting stress and mental duress. After review by the Workers' Compensation Insurance Company, they ordered EVERINGHAM back to work. Shortly after this on June 2, 1999, Ken EVERINGHAM resigned from the Sheriff's Department.

Captain McCabe advised the undersigned that the Sheriff's Department is willing to cooperate with the investigation and will provide the undersigned with all available reports and documents.

OTHER PERSONS:

NAM: KENNETH EVERINGHAM

		RAC: W	ETH: U
NBR: 1200	DIR: N	SEX: M	OPS:
STR: TELEGRAPH		DOB:	SSN:

SFX: ROAD		HGT:	SID:
CTY: PONTIAC	ST: MI	WGT:	FBI:
TXH:	ZIP:	HAI:	MNU:
TXW:		EYE:	PRN:

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3 of 4	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

Michigan Department of State Police
ORIGINAL INCIDENT REPORT

ORIGINAL DATE	INCIDENT NO.
Tue. Jan. 29, 1999	COC-0000046-99
TIME RECEIVED	FILE CLASS
1058	50000

NAM: KENNETH QUISENBERRY

		RAC: W	ETH: U
NBR: 1200	DIR: N	SEX: M	OPS:
STR: TELEGRAPH		DOB:	SSN:
SFX: ROAD		HGT:	SID:
CTY: PONTIAC	ST: MI	WGT:	FBI:
TXH:	ZIP:	HAI:	MNU:
TXW:		EYE:	PRN:

STATUS:

Open; pending additional investigation.

PAGE	INVESTIGATED BY	REPORTED BY	REVIEWED BY
4 of 4	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

Michigan Department of State Police
SUPPLEMENTAL INCIDENT
REPORT 0001

ORIGINAL DATE	INCIDENT NO.
Tue. Jun. 29, 1999	COC-0000046-99
SUPPLEMENTARY DATE	FILE CLASS
Wed, Jul 07, 1999	50000

INCIDENT STATUS
Open

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

07/01/99 D/Lt. Maier — Intelligence information received shows that KENNETH EVERINGHAM is a "Rated Player" with the Windsor Casino and has been since 1/98. In 1998, EVERINGHAM gambled for 45 hours with total betting of $2,800. In 1999 to date, EVERINGHAM has gambled for 48 hours with total bets of $4,000. Additional information on dates and times and what type of gambling was done by EVERINGHAM will require a Search Warrant.

07/02/99 D/Lt. Maier — Reviewed original report, pending additional investigation and interviews.

INTERVIEW KEN QUISENBERRY AND CHRIS YUCHASZ:

On Wednesday, July 7, 1999 at approximately 9:00AM, the undersigned officer met with an interviewed both SGT. KEN QUISENBERRY and SGT. CHRIS YUCHASZ of the Oakland County Sheriff's Department. This meeting/interview took place at the Oakland County Sheriff's Department, Detective Bureau interview room.

KEN QUISENBERRY informed the undersigned that he was assigned between $1,000 and $5,000 cash at any given time for expenses such as narcotic's purchases and informants. The money was supplied by NET and QUISENBERRY has signed a hold chit. When a expense occurred, QUISENBERRY would fill out a chit and submit it through NET channels. QUISENBERRY showed the undersigned a copy of two hold chits that he received 5/16/97 – $1,000 and on 8/21/97 – $4,000.

KEN QUISENBERRY stated that he paid his informant on the PUERTAS investigation most of the time after a transaction took place. The payment would range from $150 to $200 each time. All payments are recorded in the NET chit book. QUISENBERRY stated that he did not keep dailies or notes on each transaction.

SGT. CHRIS YUCHASZ informed that undersigned that he did not keep dailies or notes. YUCHASZ stated that he basically assisted SGT. QUISENBERRY with the investigation by helping out with the surveillance and on occasion did close in surveillance. YUCHASZ also stated that he can not recall who was present on each day of surveillance during this investigation but knows that Deputy EVERINGHAM was only assisting the case with surveillance and had no part with any of the investigation.

SGT. KEN QUISENBERRY further stated that the entire PUERTAS investigation was his investigation and his alone. Deputy KEN EVERINGHAM has nothing to do with meeting with the informant or decisions with the case investigation. EVERINGHAM was only used to help on surveillance and not used every time, and not up to speed with the case investigation. EVERINGHAM while assigned to NET had his own chit money and had to follow NET policy with recording expenses with the chit books.

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Michigan Department of State Police
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REPORT 0001

ORIGINAL DATE	INCIDENT NO.
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SGT QUISENBERRY advised that he has a clear recall of August 30, 1997. It was early into the case investigation and it was a Saturday when his informant was able to work a deal at the Mega Bowl with Joe PUERTAS. QUISENBERRY stated that he needed assistance with surveillance and nobody was available. QUISENBERRY stated that he called KEN EVERINGHAM at his residence and EVERINGHAM was having a family function at home. EVERINGHAM came out to assist with the surveillance and left the family function. On this date, EVERINGHAM went inside the Mega Bowl and witnessed the C/I's activities who later came out and confirmed what the C/I reported to QUISENBERRY. Again, QUISENBERRY

stated that EVERINGHAM had no direct contact with the Informant.

KEN QUISENBERRY stated that August 30, 1997 is the only surveillance that he recalls independently. When asked about August 26, 1997, QUISENBERRY stated that if the report say's that EVERINGHAM was present then he was present. QUISENBERRY further stated that he always had someone else with him on every surveillance.

Both QUISENBERRY and YUCHASZ informed the undersigned that everyone assigned to the Homicide Task Force reported their overtime through different channels. Neither YUCHASZ or QUISENBERRY ever approved or were aware of the Overtime that was being submitted by EVERINGHAM. QUISENBERRY further stated that he never saw EVERINGHAM'S overtime sheets and does not know what hours were claimed on any given surveillance. QUISENBERRY and YUCHASZ both stated that they **NEVER** told EVERINGHAM to claim Overtime for surveillance that was worked when EVERINGHAM was not present.

It was reported by both SGT. QUISENBERRY and SGT. YUCHASZ that never during or after the case investigation was completed that EVERINGHAM stated to either of them that he had a problem with any part of the case. EVERINGHAM never reported any possible problem with the case to SGT. GOODRICH of the Homicide Task Force or to NET Commander MARK MENGHINI. The claim by EVERINGHAM that he could not go to anyone with the problem is total misleading, EVERINGHAM's best friend is Oakland County Sheriff's Lt. Bill KUCYK and KUCYK has not reported being informed by EVERINGHAM of any possible problem. It is clearly believed by both YUCHASZ

and QUISENBERRY that if anybody had a problem with any investigation, that D/F/LT. MARK MENGHINI or SGT. GOODRICH would address the issue and take care of it.

SGT. KEN QUISENBERRY stated that he recalls in the spring of 1998, he attended a Homicide investigation class in Florida and roomed with KEN EVERINGHAM. The first day in Florida the both of them went out on a boat from Miami into international waters and gambled. QUISENBERRY recalls that he won some money and EVERINGHAM lost. During the rest of the week, EVERINGHAM did not go out with the group, he always went to the Dog Tracks and gambled.

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Michigan Department of State Police
SUPPLEMENTAL INCIDENT
REPORT 0001

ORIGINAL DATE	INCIDENT NO.
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SGT. CHRIS YUCHASZ stated that while he was assigned to the Homicide Task Force, he was asked by SGT. GOODRICH if KEN EVERINGHAM had a gambling problem. SGT. YUCHASZ was aware that EVERINGHAM liked to gamble but did not believe it was any type of a problem. Both YUCHASZ and QUISENBERRY advised that at no time did they loan chit money to EVERINGHAM so that EVERINGHAM could go over to Windsor

and gamble. Both YUCHASZ and QUISENBERRY state that they never traveled with EVERINGHAM and gambled in Windsor. The undersigned was informed that it does not take a lot to become a rated player at any casino and it should not be viewed as a big deal.

CONTACT S/A. TONY SANO, FBI:

On Friday, July 9, 1999, S/A. Tony Sano left the undersigned officer a voice mail message stating that he has been in contact with KEN EVERINGHAM and that EVERINGHAM has agreed to take a polygraph. The Polygraph has been scheduled for July 22, 1999 at 10:30AM, at the FBI Detroit Office, Examiner Sam RAFFINO.

CONTACT OAKLAND COUNTY PROSECUTOR'S OFFICE:

On July 12, 1999 at approximately 10:00AM, the undersigned officer met with Assistant Oakland County Prosecutor Mr. Paul STABLIN at the Oakland County Prosecutor's Office. The undersigned briefly reviewed the Joseph PUERTAS investigation and the involvement of KEN EVERINGHAM with that investigation. EVERINGHAM has testified that he did not have a part of the investigation except to assist with surveillance.

APA Paul STABLIN stated that KEN EVERINGHAM testified on December 29, 1997 at the District Court Examination to facts concerning the surveillance that he was involved with including August 26, 1997. In the spring of 1998, KEN EVERINGHAM along with APA Gary Tunis went through each report covering the facts of the case, and at that time EVERINGHAM reported that he was present for the surveillance of the C/I and the

purchase of Cocaine on August 26, 1997 at the Mega Bowl. At this time it is reported that EVERINGHAM stated that he observed the C/I enter the Mega Bowl and observe the same C/I exit later and meet up with SGT. QUISENBERRY. At no time did EVERINGHAM indicate to anyone that something was wrong with the investigation, including EVERINGHAM being recorded as being on surveillance when he was not present. It is now reported that EVERINGHAM has changed his testimony stating that he was present on only two occasions not three as recorded. The date that he claims not to be present during surveillance and a C/I purchase is August 26, 1999.

APA STABLIN showed the undersigned the Imprest Cash Receipt book for NET that included the receipts for the PUERTAS investigation. A Receipt #29304 – $100 to the C/I dated 8-26-97 was signed by disbursing Officer KEN QUISENBERRY and witnessed by KEN EVERINGHAM as payment made to C/I. Also on this date a controlled purchase of cocaine from Mega Bowl was recorded in the Imprest cash records for $600.

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Michigan Department of State Police
SUPPLEMENTAL INCIDENT
REPORT 0001

ORIGINAL DATE	INCIDENT NO.
Tue. Jun. 29, 1999	COC-0000046-99
SUPPLEMENTARY DATE	FILE CLASS
Wed, Jul 07, 1999	50000

APA STABLIN supplied the undersigned with copies of the NET Imprest Cash Receipts pertaining to this investigation. These cash receipts include payments to the informant DN2578 and payments for purchases of narcotics from the Mega Bowl and Joseph PUERTAS. The undersigned was also provided a copy of the first session of the deposition of KEN EVERINGHAM, dated June 16, 1999. The transcription of the second session has not been completed as of this date, and the third session is scheduled for July 16, 1999.

COMPLAINT STATUS:

Open; pending additional investigation.

PAGE	INVESTIGATED BY	REPORTED BY	REVIEWED BY
4 of 4	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

Michigan Department of State Police
SUPPLEMENTAL INCIDENT
REPORT 0002

ORIGINAL DATE	INCIDENT NO.
Tue. Jan. 29, 1999	COC-0000046-99
SUPPLEMENTARY DATE	FILE CLASS
Mon. Jul 26, 1999	50000

INCIDENT STATUS
Open

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

07/26/99 D/Lt. Maier Reviewed, pending additional investigation and interviews.

CONTACT FORMER N.E.T. COMMANDER MARK MENGHINI:

On July 14, 1999 at approximately 6:30 A.M., the undersigned officer met with retired MSP D/F/Lt. Mark Menghini at the Denny's Restaurant located in Novi, MI. The purpose of this meeting was to review and discuss the Joseph PUERTAS investigation NET #975-2309-97.

Mark Menghini stated that he was fully aware of the investigation being conducted by Sgt. Ken Quisenberry of the Oakland County Sheriff's Department. Sgt. Quisenberry was assigned to the Homicide Task Force that was housed within the NET office. Sgt. Quisenberry developed an informant who was able to purchase narcotics from PUERTAS and Quisenberry ran with the investigation. Mark Menghini also stated that throughout the entire investigation, Quisenberry would report on the activity

and Quisenberry was advised that if he needed any assistance or additional personnel to just inform F/Lt. Menghini or D/Lt. Richard Torongeau.

Retired D/Lt. Mark Menghini further stated that he was present during the execution of the Search Warrants and was a witness to the interview of Joseph PUERTAS. The location did not appear to be a typical dope house and PUERTAS was defiant that he had nothing to do with the sale of any cocaine. It appeared that PUERTAS's biggest concern was that he did not want to go back to jail.

Mark Menghini also stated that he first became aware that there may be a problem with the investigation when Sgt. Quisenberry came to him stating that a deal had to be reached. Sgt. Quisenberry informed Menghini that some of the information within the investigation was not really the way things were observed. Quisenberry did not elaborate and Menghini believed that the pressure of the investigation, the large seizure and the media interest were getting to Quisenberry. Upon reviewing the entire investigation, it became the opinion of F/Lt. Menghini that Sgt. Quisenberry conducted a sloppy investigation and cut too many corners. The informant used was not very good and all the purchases were conducted by the informant with no undercover officer involvement.

Retired D/Lt. Menghini informed the undersigned that the defense team for Joseph PUERTAS is receiving help from within the Oakland County Sheriff's Department from current and former Deputies. The information is being twisted to damage the State's case whenever possible.

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Mark Menghini further informed the undersigned from the very beginning of this investigation, to the execution of the search warrants and with follow up investigations by the mini task force run by the prosecutor's office, Menghini had almost daily contact with former Deputy Ken Everingham. Menghini also interviewed Everingham regarding this investigation and Everingham never indicated that anything could possibly be wrong with any part of this case investigation. Everingham testified at the Examination as to the events of the investigation with the same information and passion that he reported throughout the investigation. Only after Everingham departed from the Sheriff's Department, did he change his story and commit perjury.

Retired D/F/Lt. Mark Menghini also stated that he was not aware of any possible gambling problems that Everingham could have had. Everingham had some Chit Money that belonged to NET. It took awhile for Everingham to repay this money and made an off the wall comment to Menghini when he returned it the money to the effect that "it really hurts to give this money away". Menghini recalls that it took a couple of weeks and several phone calls from Menghini for Everingham to repay this money.

Mark Menghini informed the undersigned that this investigation became a tangled mess when the search warrants turned up a large amount of money (believed 1.9 million dollars) and no narcotics. This case was never investigated with the intent of obtaining money, it was always a narcotics investigation.

STATUS:

Open; pending additional investigation and interviews.

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REPORT 0003

ORIGINAL DATE	INCIDENT NO.
Tue. Jun. 29, 1999	COC-0000046-99
SUPPLEMENTARY DATE	FILE CLASS
Mon. Aug. 02, 1999	50000

INCIDENT STATUS
Open

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

97-30-99 D/Lt. Maier Reviewed, pending additional investigation/interviews.

INTERVIEW – KENNETH EVERINGHAM:

On 7/29/99 at approximately 10:00 a.m., the undersigned officer along with S/A. Dennis Kapelanski met with Attorney Fred Gibson and his client, KENNETH EUGENE EVERINGHAM, w/m, 6/18/56 and Cathy EVERINGHAM, w/f, 3/19/66, Ken's wife. This meeting took place at the Conference Room at the Law Office of Fred Gibson in Sterling Heights, MI.

Kenneth EVERINGHAM informed the undersigned that his home address is 4363 Highfield Rd., Waterford, MI, 248/673-2134. KENNETH EVERINGHAM stated that he was employed for 21.5 years with the Oakland County Sheriff's Department working in various job positions: jail, road patrol, homicide investigations, Oakland County NET, and the Felony Apprehension Team (FAT), resigning on June 2, 1999.

EVERINGHAM stated that sometime in either July or August of 1997, Ken Quisenberry began an investigation into the reported drug dealing of JOSEPH PUERTAS. Also assigned to this investigation were Steve Pearson and Gary Miller. EVERINGHAM reports that one day before August 19, 1997, he was approached by Ken Quisenberry and asked to assist with the PUERTAS case with surveillance. EVERINGHAM does not recall but was not available at on the day requested. EVERINGHAM states that Ken Quisenberry told him that he would be put down as being on surveillance anyway.

EVERINGHAM stated that on August 21, 1997, he assisted the investigation by doing surveillance at the Mega Bowl while the C/I went in and met with PUERTAS and others. EVERINGHAM states that he was provided the physical description and clothes that the C/I would be wearing. EVERINGHAM states that he entered the bowling alley via the bar entrance, walked through the bowling alley and observed the C/I talking with PUERTAS and two others near the bowling alley counter. EVERINGHAM states that he went into the bar, where he was not able to observe the C/I's meeting. Approximately 10 minutes later, EVERINGHAM observed the C/I leave the bowling alley. KENNETH EVERINGHAM states that waited another 5 minutes before he, himself departed the bowling alley bar area and went outside to report the information to Ken Quisenberry. EVERINGHAM stated that at no time did he observe the C/I meeting with Ken Quisenberry and he did not meet the C/I himself. EVERINGHAM stated that he does not think anyone else was working surveillance on this date.

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KENNETH EVERINGHAM also states that on August 30, 1997, he met again with Ken Quisenberry in the area of I-75 and Baldwin Rd. for the purpose of doing surveillance at the Mega Bowl. EVERINGHAM states he went into the Mega bowl bar area and took a table. At this time, he observed PUERTAS at the bar working on a video machine. A short time later, EVERINGHAM reports he observes the C/I enter the bar and talk to PUERTAS. It appeared that they were talking about the floor or something, because they both kept looking at the floor near the bar. After 2-3 minutes, the C/I leaves the bar and walks into the bowling alley area and out of sight. Approximately 5 minutes later, EVERINGHAM reports that he observes PUERTAS leave the bar. EVERINGHAM stated that he waited another 10 minutes then he also left the bar and returned to the meet spot to meet with Ken Quisenberry. EVERINGHAM stated that as far as he was aware, he was the only surveillance and nobody else was working this date other than Ken Quisenberry.

Reference August 26, 1997, the incident report authored by Ken Quisenberry listed EVERINGHAM as working on this date doing surveillance. EVERINGHAM states that

he does not recall working on this date, that he only recalls assisting on this investigation twice, those dates being on August 21 and 30. EVERINGHAM stated that he was not on surveillance inside the bar or bowling alley on this date, and that he does not recall doing outside surveillance. EVERINGHAM states that he only recalls doing surveillance inside the bar/bowling alley.

KENNETH EVERINGHAM stated that he testified from memory at the District Court Examination regarding his surveillance's on August 21 and August 30, 1997. EVERINGHAM stated that he used the incident report to testify to the events of August 26, 1997, and was told by Ken Quisenberry that he was present on August 26, 1997. KENNETH EVERINGHAM does not have any records or documents to support his claim that he was not present on August 26, 1997.

KENNETH EVERINGHAM also stated that he was never present when Ken Quisenberry met with the C/I. He never witnessed any payments from Ken Quisenberry to the C/I, but he did sign the payment vouchers later when requested by Ken Quisenberry, even if he was not working when a payment was made.

EVERINGHAM further stated that in July of 1998, he was called into a meeting with the present Undersheriff Tom Quisenberry. Also present were Ken Quisenberry, Gary Miller, Steve Pearson, Jim Ahern, Ken Surma and Nick Tomburrini of the Oakland County Prosecutor's Office. The purpose of this meeting was to inform everyone that the Prosecutor's Office was setting up a mini task force to go over the evidence and to further the investigation on the PUERTAS matter.

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In August of 1998, a meeting was held at the Oakland County Prosecutor's Office with the following individuals present: Gary Miller, Ken Quisenberry, KENNETH EVERINGHAM, Steve Pearson, Nick Tomburrini, Ken Surma, Mark Menghini, Paul Stabling, Gary Tunis and Jim Huluska. It was at this meeting that Mark Menghini made a statement that he has never sent an innocent man to jail, and he's not going to start now. EVERINGHAM stated that he asked about a possible polygraph on C/I but this possibility was not addressed. After the meeting EVERINGHAM reports that Mark Menghini told him that this case stunk and that he does not believe the C/I. EVERINGHAM states that after this meeting, he approached Sgt. Jim Ahern about concerns with the investigation. However, before he could list his concerns, Ahern informed him to shut up and to do as you are told unless you have bars on your shoulders, that he was my boss.

EVERINGHAM also stated that this mini-task force was comprised of the people that created the original problem. Gary Miller, Ken Quisenberry and Steve Pearson. EVERINGHAM stated that these three individuals worked on their own and did not share information which was

evidence to others working on the task force, including Prosecutor Inv. Ken Surma. EVERINGHAM stated that he did not discuss the problems he had with the investigation (including August 26, 1997) with anyone else, not even members of the Prosecutor's Task Force. EVERINGHAM personally did not believe that the C/I was reliable enough to work this type of investigation. KENNETH EVERINGHAM stated that the first time he discussed the investigation including the August 26 1997 surveillance was with Chris Lanfear at the pre polygraph before the second test.

KENNETH EVERINGHAM stated that while working on the prosecutor's office task force to further investigate PUERTAS, he assisted with surveillance at the Springfield Inn on occasion. The purpose was to identify the owner and operator of the Springfield Inn, it is unknown if they ever were able to determine this information. EVERINGHAM also stated that he now recalls that on two occasions he was told by Ken Quisenberry to put himself in for Overtime on a previous night when a narcotics buy occurred. Ken Quisenberry told KENNETH EVERINGHAM to carry surveillance, it is believed that this occurred in August with Chris Yuchaz and again in October. The exact dates are not known. EVERINGHAM believes that the October date may have involved the Gary Sisk investigation, which shows EVERINGHAM on surveillance, and EVERINGHAM states that he never worked surveillance on the Sisk investigation.

KENNETH EVERINGHAM further informed the undersigned that in November of 1998, he became aware that his issued Oakland County Sheriff's Department firearm was missing. EVERINGHAM stated that he was in the process of doing various surveillances and must have left

the gun in a surveillance car or van. At the time, he was working with Sgt. Whitefield from Oakland County S.D. KENNETH EVERINGHAM stated that he personally notified Sgt. Jim Ahren and Sgt. Whitefield that the gun was misplaced. On several occasions both Whitefield and Ahren would joke with EVERINGHAM about where his gun was now. EVERINGHAM believed that he reported the missing weapon properly.

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KENNETH EVERINGHAM reported that on February 1, 1999, he was called into the office of Lt. Joe Quisenberry and questioned about the gun being misplaced. Also at this time EVERINGHAM was informed of an internal investigation that was going to be conduced regarding the Firearm, a Cell phone that was lost and numerous trips to Canada with his county vehicle. EVERINGHAM stated that he was ordered to take an urine test and was re-assigned to the Jail. KENNETH EVERINGHAM complied with the urine test and reported to the jail as ordered.

KENNETH EVERINGHAM reports that he worked in the jail for two or three days then went on disability leave (Stress). EVERINGHAM remained on Stress Disability

until late May 1999 when he returned to work in the Jail. He worked approximately three more days and was supposed to have a meeting with Captain Mike McCabe to discuss his discipline but McCabe cancelled the meeting. EVERINGHAM felt this was unfair since he had been waiting since February to learn his fate. EVERINGHAM stated that he took that day off as a sick day. While off, he learned that the Deputy that was training him on the Jail operation was Nicole Anthony, the girlfriend of Ken Quisenberry. EVERINGHAM felt that all this was too much and felt that he had to resign which he did on June 2, 1999.

EVERINGHAM stated that the internal investigation was conducted by Sgt. Bill Harvey. That while he was on disability stress leave he cooperated fully and with the advice of a union attorney, submitted to a polygraph. The purpose of this first polygraph was to determine if he sold his weapon or knew what had happened to it. EVERINGHAM reports that he passed this test as being truthful. EVERINGHAM stated that a second polygraph was run and this time he hired his own attorney Art Weiss. This polygraph referenced several issues; compromise his position or the department, the co-mingling of NET money and personal money and falsifying records. EVERINGHAM reports that the first chart was good, but problems were discovered on the next chart and the test was stopped.

KENNETH EVERINGHAM and his attorney Fred Gibson informed the undersigned that they are willing to fully cooperate in any future investigations and will make themselves available whenever needed.

CONTACT LT. WILLIAM KUYCK:

On August 3, 1999 at approximately 6:00 a.m., the undersigned officer met with Oakland County Sheriff Department Lt. Bill Kuyck at the Bob Evans Restaurant located on 14 Mile Rd. at I-75. The purpose of this meeting was to discuss the allegations made by former Deputy KENNETH EVERINGHAM concerning the Sheriff Department and a narcotics investigation.

Lt. Kuyck advised that the Oakland County Sheriff Department have a few deputies that believe that NET does not serve the needs of Oakland County good enough and they attempt to conduct criminal narcotics investigations themselves. Its [sic] reported that on occasions these officers will not follow NET policies or policies from the Sheriff Department in an effort to make a case.

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Lt. Kuyck further stated that he had no part and no knowledge of the PUERTAS investigation until after the search warrants were executed. Lt. Kuyck stated that when the search warrants were executed he was assigned to a special investigation involving a narcotics investigation but was not included as part of the search warrants

on the PUERTAS investigation. The Oakland County Sheriff's Special Response Team (SRT) was also excluded from participating with the search warrants. Lt. Kuyck found these exclusions suspicious, but again states that he did not have any information on the investigation.

After the search warrants were executed and some information regarding the investigation became public knowledge, Lt. Kuyck reports that he was uncomfortable because he has known the Confidential Informant (C/I) for some time and believes that this C/I has no credibility. Also Lt. Kuyck believes that this C/I, (which is a known Snitch) could not purchase any narcotics (cocaine) from JOSEPH PUERTAS. Lt. Kuyck stated that he would have concerns with any investigation that this C/I was used in, especially if all the purchases were done between the C/I and Suspect and no U/C was used.

Lt. Kuyck advised that in early 1997 he was the commanding officer for the Sheriff's Departments Special Response Team (SRT) and the SRT was used to assist with the execution of a search warrant at the C/I's residence. At this search Lt. Kuyck again stated that he did not have all the facts of the criminal investigation but at the scene he personally observed a large amount of cocaine. Information is that the C/I was attempting to work off this charge.

Lt. Kuyck also stated that he believes that the Sheriff's Department overtime was abused, that those officers assigned to NET, FAT or the Homicide Task Force were operating without supervision and it is believed that overtime abuse took place. Lt. Kuyck stated that he was not in the chain of command to approve overtime.

Lt. Kuyck further advised the undersigned that he was not involved with any part of the PUERTAS investigation and

former Deputy KENNETH EVERINGHAM never discussed the investigation before, during or after with him. Lt. Kuyck states that he considers KENNETH EVERINGHAM a good friend, someone who is part a annual golf trip up north with Lt. Kuyck. Lt. Kuyck further stated that he personally believes that KENNETH EVERINGHAM gambled too much and on occasions up north would stay up all night at a casino then play golf all of the following day.

Regarding the internal investigation concerning KENNETH EVERINGHAM done by the administration of the Sheriff's Department, Lt. Kuyck stated that he was not involved with this internal investigation but did discuss this investigation with former Deputy EVERINGHAM. EVERINGHAM indicated to Lt. Kuyck that the administration went too far in an attempt to get him and that he was going to resign. Lt. Kuyck stated that he advised EVERINGHAM not to resign.

STATUS:

Open, pending additional investigation.

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Fri. Aug 13, 1999	50000

INCIDENT STATUS
Open

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

None.

CONTACT INVESTIGATOR KEN SURMA – OAKLAND COUNTY PROSECUTORS OFFICE:

On 8/5/99 at approximately 1:30PM, the undersigned officer met with Oakland County Prosecutor's Office Investigator Ken Surma at the Waterford Big Boy Restaurant. At this meting Inv. Surma stated that he was assigned to the Prosecutor's Office mini task force that further investigated Joseph Puertas and possible additional narcotic's trafficking. Ken Surma stated that he was basically partnered up with Ken Everingham and during the entire time they were partners, not once did Everingham say that he felt that anything was wrong with the investigation. Everingham was basically a gopher for the task force as he was with all cases that he was involved with. Ken Surma further stated that the mini task force did not enhance the case or hurt the investigation.

Inv. Surma has been employed with the Oakland County Prosecutor's Office for approximately 2 years. Inv.

Surma is a former Detroit Police Office with many years' experience working in various Narcotics units. It is the position of Inv. Surma with the information that he has been provided regarding the Puertas investigation that the C/I purhcased the Cocaine as reported. Ken Surma further stated that Everingham played a minor role with the original investigation and has nothing to offer to the case. Everingham did not observe any transactions and was not involved with the investigation close enough to have any impact. Inv. Surma stated that the Puertas case will be decided by the testimony of the C/I and Sgt. Ken Quisenberry.

Inv. Ken Surma informed the undersigned that he was aware that former Oakland County Sheriff Deputy Ken Everingham was gambling a lot and may have had a problem. Inv. Surma stated that he talked with Everingham from time to time about the gambling but did not take it any further, felt that it was not his place.

CONTACT D/LT. RICH TORONGEAU:

On 8/5/99 at approximately 2:20PM, the undersigned officer met with D/Lt. Rich Torongeau at the NET office parking lot. At this time this case investigation was reviewed along with information on the Puertas investigation. The undersigned was supplied with information on the C/I, Joseph Sweeney, for possible future interviews.

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CONTACT OAKLAND COUNTY ASSISTANT PROSECUTOR JAMES HULUSHKA:

On 8/5/99 at approximately 3:10PM, the undersigned met officer with Mr. James Hulushka at his office. At this time the entire case investigation was reviewed. Mr. Hulushka advised that the Joseph Puertas criminal case is now scheduled for October 8, 1999, delayed for approximately two (2) months because Mr. Puertas is claiming a back injury and cannot attend court. Mr. Hulushka further stated that the Prosecutor's Office fully intends to proceed with the criminal trial as planned. It is believed that Ken Everingham's statements are false. Everingham played a very minor role in that investigation and does not know any details of the case.

Mr. Hulushka also stated that he, himself, the Prosecutor's Office and the Oakland County Sheriff's Department are all being sued by Ken Everingham and his Attorney Fred Gibson. The original law suit has been dismissed by the U.S. Federal Court in Detroit. Everingham and Gibson then filed the suit in Oakland County Circuit Court. It is believed that Everingham gambled away all his savings and retirement money and is using the lawsuits in an attempt to regain some of his money.

ADDITIONAL INFORMATION:

The undersigned office has scheduled an interview with C/I. Joseph Sweeney for 8/15/99 at 4:00PM, at the Sweeney residence located in Metamora, MI. Sgt. Quisenberry of the Oakland County Sheriff's Department assisted the undersigned in scheduling this meeting.

STATUS:

Open pending additional investigation and interviews.

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INCIDENT STATUS
Open

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

08/13/99 D/Lt. Maier Reviewed, pending additional investigation

CONTACT/INTERVIEW INFORMANT JOSEPH PATRICK SWEENEY:

On Sunday, August 15, 1999 at approximately 3:30PM, the undersigned officer met with Confidential Informant (C/I) Joseph Patrick Sweeney, W/M, 3/1/54, DN#2578. This meeting took place in the parking lot of a Mobil Gas Station located on M-24 just south of I-69.

Joe Sweeney stated that he agreed to assist the Oakland County Sheriff's Department as an informant to help his brother Jim who was previously involved in Narcotic's trafficking. Sweeney stated that he was agreeable to anything that OCSD Sgt. Ken Quisenberry or Deputy Gary Miller wanted to undertake. Sweeney stated that he also dealt with Deputy Steve Pearson but that his contact person was Sgt. Quisenberry. The decision to investigate the Mega Bowl and owner Joe Puertas was Deputy

Miller's idea. Sweeney stated that he has known Puertas for a long time and believed that if Puertas was dealing with cocaine as reported that he (Sweeney) would be able to buy from him.

Joe Sweeney stated that he recalls before every attempt to purchase at the Mega Bowl, he personally was searched and so was his vehicle. After the first few attempt and purchases, he no longer used his personal vehicle, and was provided a ride to the Mega Bowl by Sgt. Quisenberry, but he personally was continued to be searched before he entered the Mega Bowl and again upon leaving and meeting with Sgt. Quisenberry. Sweeney stated that Dep. Miller and Pearson would be the ones searching his vehicle. Sweeney further stated that he did not know Dep. Everingham was involved with the case and never met with him before going to the Mega Bowl.

Joe Sweeney reported to the undersigned that he purchased cocaine from Joe Puertas or his assistant Michael Tally at the Mega Bowl on six (6) occasions. During the first few times into the Mega Bowl, Sweeney was not aware that he was being watched inside the bar and bowling alley. Sweeney noticed seeing someone who he later identified as Deputy Ken Everingham in the bar area watching him. Sweeney stated that he recalls Everingham in the bar in the early meetings and purchases at the Mega Bowl. Sweeney stated that he was aware later on that Sgt. Quisenberry and others were inside watching also.

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Joseph Patrick Sweeney stated that during the time that he was assisting the Sheriff's Department he was back using cocaine himself and that when he was paid by Sgt. Quisenberry, he would find some cocaine to smoke for himself. Sweeney stated that he had no money and never had any cocaine himself when these deals were occurring. Sweeney stated that throughout the buys at the Mega Bowl, Deputy Ken Everingham was present only on the first 2 or 3 buys, and was not seen again by Sweeney until the fall of 1998 when Sweeney was interviewed at the Prosecutor's Office and Everingham was present.

Sweeney stated that he never planted anything involving any case and Sgt. Quisenberry did not ever offer to plan narcotics just to get someone. Sweeney stated that he always met with Sgt. Quisenberry and that Sgt. Quisenberry paid him for being an informant. Sweeney stated that he was not paid every time after a buy was made, sometimes Sgt. Quisenberry would catch him at a later date. He only recalls being paid by Sgt. Ken Quisenberry. Sweeney stated that he is clear about the facts of the case but because of his past cocaine use, the defense attorneys are able to confuse his thought processes and make him say things that he is not sure of. Sweeney further stated that he is now and has been for awhile clean from narcotics and is working hard to remain clean.

Sweeney recapped by stating that he purchased cocaine from Joe Puertas or Mike Talley with Joe Puertas' approval on six (6) occasions at the Mega Bowl. Sweeney stated that he never knew how much he was going to buy until he met with Sgt. Quisenberry and Sgt. Quisenberry would provide him the money and tell him how much to buy. Sweeney stated that he did not know how many surveillance people were helping Sgt. Quisenberry, he only knows that he purchased cocaine in various amounts from Joe Puertas and Michael Talley at the Mega Bowl on six (6) separate occasions.

CONTACT/INTERVIEW RETIRED O.C.S.D. SGT. MARK GOODRICH:

On Tuesday, August 17, 1999 at approximately 10:15AM, the undersigned officer met with and interviewed Retired Oakland County Sheriff's Department Sgt. Mark Goodrich. This meeting and interview took place at the Law Office of Mark Goodrich's Attorney Fed Gibson. Retired Sgt. Goodrich retired from the Oakland County Sheriff's Department on June 1, 1999.

Mark Goodrich stated that at the time of the Puertas narcotics investigation, he was assigned as team leader of the Sheriff's Departments Homicide Task Force, a unit that was housed at NET but not officially a part of NET. The duties of this Homicide Task Force were to develop informants and investigate old homicides, mainly in the city of Pontiac. Goodrich stated that he never has met the Informant on the Puertas case as far as he is aware. The officers assigned to the Puertas investigation did not report directly to him on the activity of the investigation. Sgt. Ken Quisenberry was assigned from NET to the homicide task force but was working on the Puertas

investigation. Deputies Gary Miller and Steve Pearson were assigned from the other units within the sheriff's department to assist Sgt. Quisenberry. Deputy Chris Yuchaz and Deputy Ken Everingham were both assigned to the Homicide Task Force and assisted with surveillance when needed on the Puertas investigation.

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It was reported by Mark Goodrich that as far as he is aware, Sgt. Quisenberry was keeping NET Commander Mark Menghini informed of the Puertas Investigation. It was Mark Menghini along with Mask [sic] Goodrich who brought the Oakland County Prosecutor's Office into the investigation. Goodrich had a reported history of not getting along with members of the prosecutor's office and saw this as a chance to mend some fences. It was the opinion of Goodrich that Sgt. Quisenberry along with Miller and Pearson that they were trying to make the Puertas case a sheriff's department case and cut NET out. Goodrich was not involved with any part of the investigation, except assisting with the execution of a search warrant.

Mark Goodrich stated that the informant on the Puertas case called into NET over a weekend and no NET officers were available to take the call, so Sgt. Quisenberry contacted the informant who wanted to work narcotics targets. Sgt. Quisenberry took the information and ran with it. Mark Goodrich has no information on any of the purchases, or who was present when the buys occurred. Goodrich stated that on one occasion both Chris Yuchaz and Ken Everingham approached him knowing that Goodrich was in his retirement pay out years and suggested to him to carry some Overtime as a surveillance officer on the Puertas case. Both informed Goodrich that they have at the direction of Sgt. Quisenberry put in for overtime that was not worked. but their names would appear as surveillance on the reports. Goodrich stated that he turned down this offer and informed both Yuchaz and Everingham that he wanted the practice of claiming overtime and not working stopped. Goodrich further stated that he only checked the Overtime requests when asked by NET Commander Mark Menghini. Goodrich was aware that everyone was working a lot of overtime on the Puertas case. Goodrich stated that he never saw any reports or dailies regarding the Puertas case and does not know how much anyone was working.

Mark Goodrich informed the undersigned that he was aware of the name Joe Puertas and that Puertas had a long time history of being known as a large scale Cocaine Dealer. Goodrich stated that he worked 30 years with the Sheriff's Department and was working the last time Puertas was arrested for delivery of Cocaine. Again Goodrich stated that on this investigation he played no role except to assist with a search warrant execution at Stix's Pool Hall and a storage building at Stix's. When

Goodrich was assigned this location, the day all the search warrants were being executed he felt he was being assigned to a lesser target location.

Mark Goodrich also stated that at the search of Stix's Pool Hall, his search team found a safe in the office of the pool hall and was provided combination for that safe. Goodrich recalls that safe containing $40,000 cash. Several additional safes were found in the storage building at Stix's Pool Hall. Employees (and Puertas family members) refused to assist with gaining access to these safes. Goodrich had Mark Menghini order up a professional Safe Expert. While waiting for the safe expert to arrive, other members of other search teams arrived and the entire search area of Stix's Pool Hall and Storage area was now covered with law enforcement officers. Goodrich stated that once the remaining safes were opened, one of the safe's contained a reported $1.8 million dollars. Mark Menghini ordered that all the money be quickly packaged up and transported to the NET office. Goodrich felt that Menghini along with APA Jim Hulushka took over the search of Stix's Pool Hall. Sometime during all this Goodrich reports that his assigned property officer, Chris Yuchaz, left unannounced and Ken Everingham completed the property. With all the confusion when all the money was recovered and the additional Search Teams arriving, Goodrich does not know who filled out the search warrant return or who handled the property.

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REPORT 0005

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Retired Sgt. Mark Goodrich also informed the undersigned that along with the Money recovered a lot of Jewelry were recovered. All property was transported back to the NET office property room. This was handled by and arranged by D/F/Lt. Mark Menghini and Oakland County Prosecutor Jim Hulushka. Goodrich further reported that he was informed by Menghini that APA Hulushka felt that Goodrich was a dirty cop. because the information on the search warrants was not as clean as Hulushka wanted it to be and that it reflects on Goodrich. Goodrich and Hulushka reportedly had a long time running battle and this was one additional battle.

The undersigned questions Mark Goodrich on how he handled Overtime requests within his assigned unit. Goodrich stated that he was not able to be out with the investigators every step of the investigations and had asked the Past Sheriff John Nichols to assign only trust worthy officers. Goodrich stated that when he received an overtime slip, he expected a report detailing what occurred. Goodrich stated that he saw most of the overtime slips for Sgt. Quisenberry, Deputies Everingham and Yuchaz but never saw a report.

Mark Goodrich stated that he was a friend with former Deputy Ken Everingham, not real close but still friends. Goodrich stated that he recalls receiving a telephone call

from Everingham in January of 1999. Everingham asked Goodrich if Mark Goodrich could check several of the NET vehicles for his (Everingham's) misplaced gun. Goodrich stated that he checked and did not find anything, the vehicles checked were pool vehicles and used by a lot of different officers. Also one of these vehicles had been to the service garage. Goodrich states that he informed Everingham to report the lost weapon to his supervisor Sgt. Ahern. Mark Goodrich stated that he did not report the missing gun to anyone, felt it was not his place because at the time Everingham was assigned to another unit.

Retired Sgt. Mark Goodrich informed the undersigned that he was a very close and personal friend of Sheriff John Nichols. Goodrich recalls receiving a telephone call in the middle of the night the night that Sheriff Nichols passed away. It was Tom Quisenberry who called and informed Goodrich of the sheriff's passing, it is reported by Goodrich that Tom Quisenberry asked Goodrich how much longer it would be before he retired. Goodrich stated that from that time on he was constantly harassed by members of the new sheriff's team, including the new Undersheriff Tom Quisenberry and others.

Goodrich stated that in February of 1999, he was called into the office of Det/Sgt. Bill Harvey. Harvey asked Goodrich about a reported 1978 beating of an inmate. Goodrich stated that he was now being accused of a 1978 beating that he was not involved in, he admitted that he arrested the subject making up the story, but no beating was involved. Goodrich stated that Sgt. Harvey agreed with him that this was a bullshit claim, but Harvey stated that he was ordered to check it out by the new administration. Goodrich stated he was reassigned to the Warrants

Division and again to the Jail in efforts to make him retire.

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Goodrich further stated that he and Ken Everingham discussed their situations between themselves. Everingham told Goodrich that he, Everingham, planned to reassign and use the Puertas case as leverage against the Sheriff's Department. Goodrich reports that he told Everingham not to resign, that his position was better to fight from within. Goodrich further informed the undersigned that he was aware that Ken Everingham has a gambling problem. Goodrich recalls a time when he and Everingham when they went to the Upper Peninsula on a prisoner pickup, a 20 hour trip in one day. Upon returning they had only about 4 hours for sleep before they were to report to work at the Homicide Task Force. Everingham told Goodrich that he was going to Windsor, that he would rather gamble for 4 hours than sleep. Goodrich also stated that he on occasions loaned money to Everingham so Everingham could pay his bills and tuition for his son's college. Goodrich stated that he did not report the gambling to anyone and that Everingham has repaid all his loans. Goodrich stated that he was not aware that Everingham

was using his department issued vehicle to travel to Canada.

RECONTACT RETIRED D/F/LT. MARK MENGHINI:

On Friday, August 20, 1999 at approximately 10:00AM, the undersigned officer made telephone contact with retired D/F/Lt. Mark Menghini. Menghini stated that he was very aware of the bad blood between Mark Goodrich and Jim Hulushka. That many battles were fought. Menghini stated that he does not recall a conversation with Goodrich about Hulushka calling Goodrich a bad cop, and does not believe that Hulushka would do that. It was widely known that Goodrich did a very good job with the Homicide Task Force.

Mark Menghini also stated that he does not recall himself or Hulushka taking over the search warrant at Stix's Pool Hall. Menghini stated that he recalls that as search teams completed their assignments, they were to go where assistance might be needed. Most ended up at Stix's Pool Hall. Menghini stated then when he arrived at about the same time as the safe expert, he observed Chris Yuchaz as being the only one working, everyone else standing around. Yuchaz was the assigned property officer and recalls Yuchaz leaving because of feeling sick. This was before the safes were opened. Menghini stated that he does not recall who Goodrich then assigned to handle the property. Menghini again stated that he nor Hulushka took over the search.

Mark Menghini further stated that when the large amount of money was discovered, he became aware that too many people were around it, so he ordered the money all bagged up and transported to NET in two man vehicles and another vehicle to follow them. Menghini stated that this

was done, the money and all the jewelry was placed in the property room at NET.

Mark Menghini also stated that during the Puertas investigation he was aware that members of the Sheriffs department might try to cut NET out of the investigation. Menghini stated that Sgt. Ken Quisenberry kept him up to date with the investigation and kept his reports up to date as well.

STATUS:

Open, pending additional investigation and interviews.

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Open	

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

09/02/99 D/Lt. Maier Reviewed, Supp. report #5, investigation and interviews continue.

INTERVIEW OAKLAND COSD SGT. GARY MILLER:

On September 3, 1999, the undersigned officer interviewed Sgt. Gary Miller of the Oakland County Sheriff's Department. This interview took place at the Detective Bureau Interview room at Oakland County. Sgt. Miller advised that he has been employed with the Sheriffs Department for the past 13 years and has worked in various assignments including Narcotics and the Rochester Hills, Detective Bureau.

Sgt. Miller stated that when the Joe Puertas investigation surfaced, he was assigned to the Rochester Hills, Sub-Station as a member of the Detective Bureau. Sgt. Miller advised that he was not assigned to any part of the Puertas Investigation and that he helped out on his own time. (no overtime, not during his scheduled work day). Sgt. Miller stated that he helped out because he had narcotics

background and liked working with Sgt. Ken Quisenberry and Dep. Steve Pearson.

Sgt. Miller stated that recalls meeting the C/I, who was working for Sgt. Quisenberry, during some other investigations and asked the C/I, if he would be able to purchase narcotics from Joe Puertas. Sgt. Miller stated that the C/I stated that he could buy from Joe Puertas. at the Mega Bowl. Sgt. Miller stated that he used to work the Orion Twp. Area of Oakland County and recalls having information that Joe Puertas was involved again with delivery of cocaine.

Sgt. Gary Miller further stated that because of scheduling he was not present on any of the occasions when the C/I made purchases from Puertas. Sgt. Miller advised that he did some close in surveillance but usually tried to avoid going into the Mega Bowl because of his past patrol activities in the area. Sgt. Miller further stated that he does not recall for sure if he ever saw Ken Everingham also working on the Puertas investigation. Sgt. Miller further stated that he is not a friend and does not like Everingham, believed that he was a "do–nothing type" and caused only problems.

Sgt. Miller stated that he was assigned to the Prosecutor's Office Task Force to assist with additional investigations into Joe Puertas. Once assigned to the task force he believes he heard from Sgt. Goodrich and Lt. Kuyck that the entire investigation was "Fucked Up". Sgt. Miller dismissed this as nothing because neither Goodrich nor Kuyck ever worked narcotics and has no investigative background.

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Sgt. Miller stated that he was surprised and disappointed when he discovered that Ken Everingham was also assigned to the task force. Everingham was nothing but a gopher and offered nothing to the task force. Everingham in Sgt. Miller's opinion spend [sic] more time trying to get out of work than working. Everingham had a history of disappearing for hours without anyone knowing his whereabouts. It was rumored that Everingham has a gambling problem and that he may have been associated with the players involved as suspects in the Puertas investigation. Sgt. Miller stated that he went to Sgt. Ahearn and complained about Everingham and being involved with the task force investigation and wanted Everingham assigned elsewhere. As a result of this complaint, Everingham was assigned to Prosecutor Ken Surma and assigned go-for work.

Sgt. Miller further stated that when the search warrants were executed he was assigned to the arrest team for the arrest of Joe Puertas. When Puertas was arrested he was transported to the Oakland County Sheriff's Department, Detective Bureau for debriefing. Sgt. Miller then assisted with the search warrant at the Mega Bowl.

INTERVIEW OAKLAND COSD DEP. STEVE PEARSON:

On September 3, 1999, at the Oakland County Sheriff's Department, Detective Bureau, the undersigned interviewed Deputy II. Steve Pearson. Dep. Pearson stated that he has been employed with the Sheriff's Department for the past 20 years. Dep. Pearson also advised that he worked in NET during 1987-1989. When the Joe Puertas case began, Dep. Pearson stated that he was aware of the case because he is a friend of Sgt. Quisenberry and he was invited in to work the case along with Sgt. Quisenberry. Dep. Pearson advised that he has worked narcotics cases in the past with Sgt. Quisenberry and Sgt. Miller and everyone got along very well, so Dep. Pearson decided to work again with Sgt. Quisenberry. Dep. Pearson stated that he worked approximately 15 to 20 various surveillances on Suspect Joe Puertas. Dep. Pearson also advised that he was paid overtime when he worked overtime.

Deputy Pearson advised the undersigned that he was present when one purchase was made by the C/I at the Mega Bowl from suspect Joe Puertas. Dep. Pearson also advised that he does not recall Ken Everingham present very much, usually not involved with investigation.

Dep. Pearson further stated that he is a friend of Ken Everingham. Approximately 5-6 years ago, Everingham was going through a Divorce and needed a place to live. Steve Pearson stated that he lives alone and helps out fellow deputies when they need a place to stay. Everingham stayed for about one year before marrying his current wife. Steve Pearson further advised that Everingham was always caught up in the rumor mill around the sheriffs department and would pull rumors together and try to

make something out of nothing. Dep. Pearson was aware that Everingham liked to go to the casinos and gamble.

Deputy Steve Pearson also stated that he got involved with the investigation because he not only liked to work with Ken Quisenberry and Gary Miller, but because one of the other targets of the investigation was a Terry Watson. Dep. Pearson stated that he was aware of suspect Watson's involvement with cocaine and wanted to be part of the case investigation. Dep. Pearson also stated that the case investigation was up and going before he became involved and was not present on August 26, 1997 when the C/I made a purchase.

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Deputy Steve Pearson also stated that he was asked to be on the Prosecutor's Office Task Force for follow-up investigation and associates on Joe Puertas. When this task force was first being set up, Dep. Pearson stated that he was present at all the meetings and does not recall Ken Everingham ever making a statement about a polygraph for the C/I. At no time did Everingham ever say anything about the investigation being bad in any way. Dep. Pearson stated

that he a [sic] friend of Everingham and if Everingham thought that the case investigation was bad, it is believed that Everingham would have said something about it to Dep. Pearson.

Dep. Pearson stated that he assisted the investigation with a search warrant at the Terry Watson residence. (dry hole). After the search warrant was completed at Watson's residence, Deputy Pearson went to Stix's Pool Hall. Deputy Pearson stated that upon his arrival at Stix's, the safes were in the process of being opened. Dep. Pearson assisted with the search of documents and was not part on the search involving the safes.

INTERVIEW OAKLAND COSD SGT. JAMES AHEARN:

On September 3, 1999 at the Oakland County Sheriffs Department, the undersigned met with and interviewed Sgt. James Ahearn. Sgt. Ahearn advised that he was an investigator for Oakland County Prosecutor's Office for 20 years. Sgt. Ahearn is now been employed by the Sheriff's Department as a Sgt. and has been for the last 2 years 8 months.

Sgt. Ahearn stated that he was not involved with any aspect of the Puertas investigation prior to the day of the arrests and search warrants. Sgt. Ahearn stated that he was assigned to assist the investigation on that day with the arrest of Joe Puertas that took place in Royal Oak. Puertas was then transported back to the Sheriff's Department and turned over to Sgt. Miller. Sgt. Ahearn stated that because he was a supervisor of the FAT team, he was aware that an investigation was taking place but again he was not involved.

Sgt. James Ahearn further stated that in the summer of 1998, he was asked by Sheriff John Nichols to review the investigative file on the Puertas case. Sheriff Nichols wanted to appoint Sgt. Ahearn to head up the follow up investigation that would target associates of Puertas along with additional financial investigations. After reviewing the file, Sgt. Ahearn agreed to head up the task force being pulled together by the Prosecutor's Office. Sgt. Ahearn stated that he was not involved with the selection process for investigators, Ken Everingham was assigned to the task force by someone higher up or had some pull within the department.

Sgt. Ahearn advised that he became concerned with Dep. Everingham almost right away. Everingham had gone to Lt. Joe Quisenberry and received $500 cash for buy and informants. This action was done without prior approval and Everingham was not able to show where he was going to spend the money. Sgt. Ahearn made Everingham keep close accounting of the money and how it was spent. Sgt. Ahearn also made a policy that nobody received any money without his approval. Everingham used the money that he previously received for U/C dinners and lunches that he and Ken Surma had while working at various establishments.

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Sgt. Ahearn further stated that at no time was any overtime issued without a time sheet accounting for the overtime, and a report. It was also reported that at no time during this task force did Dep. Ken Everingham mention anything about the original investigation being bad, or any of the information being misrepresented. Everingham was viewed as a "not a ball of fire investigator" but more of a "go for" and that is what he was mostly used for during the task force follow up investigations.

Sgt. Ahearn also stated that he was not directly involved with the internal investigation involving Ken Everingham, but was aware that it centered on Everingham losing his assigned gun and gambling over in Canada. Sgt. Ahearn stated that he never was aware that Everingham was using his County issued vehicle to cross into Canada to gamble at the Windsor Casino. Sgt. Ahearn stated that he has a relative that works at the Detroit/Canada Tunnel for the U.S. Border Patrol. This relative in the past made remarks about others under Sgt. Ahearn's command when they crossed the border. Sgt. Ahearn stated that he never talked about Ken Everingham crossing the border.

Sgt. Ahearn only became aware of the missing firearm when it was reported on 02/01/99 by Dep. Everingham. It was unknown that the gun was missing for up to three (3)

months. Sgt. Ahearn stated that he would not have allowed Everingham to work without his firearm, officer safety.

INTERVIEW OAKLAND COSD SGT. ALAN WHITEFIELD:

On September 3, 1999 at the Oakland County Sheriff's Department, the undersigned officer met with and interviewed Sgt. Alan Whitefield. Sgt. Whitefield is assigned to the Fugitive Apprehension Team (FAT). Sgt. Whitefield was not involved with any aspect of the Puertas investigation. Sgt. Whitefield was assigned to the Airport Interdiction Team in December of 1997 when the search warrants were executed. Sgt. Whitefield advised that his team was not included as participants in the search warrants being executed. Sgt. Whitefield was not assigned to the Prosecutor's Task Force.

Sgt. Whitefield advised the undersigned that when Ken Everingham was first assigned to the FAT team from the Prosecutor's task force, it was about three (3) weeks before Sgt. Whitefield first saw Everingham. Everingham was never able to account for his whereabouts during that time. Sgt. Whitefield who is friends with Everingham, ordered all the contact phone numbers (pager, cell phone, home phone and any others) for Everingham to be provided. Everingham had a history of disappearing and Sgt. Whitefield wanted to keep tabs on Everingham.

Sgt. Whitefield reports that one morning in the FAT office he overheard Ken Everingham joking with other members of FAT that he can't find his gun. Sgt. Whitefield stated that he was not part of that conversation and about 15 minutes later, he confronted Everingham with the information and told Everingham to write a lost gun report. It is reported that Everingham informed Sgt. Whitefield that

he had just misplaced it and that he was still looking for the gun.

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Sgt. Whitefield reports that a while later, Everingham tells him that he, Everingham, has lost his cellular telephone and wants to report it. At this time Sgt. Whitefield reports that he ordered Everingham to make a report for the lost Cell Phone and also orders the report to include the lost firearm if it was not recovered. Sgt. Whitefield stated that he did not follow up on it any further believing that the gun was either recovered by Everingham or included in the lost cell phone report.

Sgt. Whitefield next reports that he gets called into Lt. Quisenberry's office and questioned why Everingham has not written a report about the lost gun. Sgt. Whitefield recalls this being approximately February 1, 1999. After that meeting with Lt. Quisenberry, Sgt. Whitefield reports that he found Everingham in the hallway and ordered another report on the lost gun, and told Everingham that all this trouble would not be happening if he, Everingham, would have written the lost gun reports when first directed to. Sgt. Whitefield stated that Everingham agreed

and told him that he wished that he would have included the lost gun in the cell phone report as told to do.

Sgt. Alan Whitefield also stated that he did not recognize a gambling problem in Ken Everingham until after it was in the open. Sgt. Whitefield reports seeing Everingham in the office as early a 5:00 a.m. and 6:00 a.m. on weekends when he was not working or had not worked. Everingham would use the departmental phone and call home, so that his wife would think that he had been working all along. Sgt. Whitefield further stated that he purchased a treadmill for his wife. This purchase was through Everingham's wife, Cathy. When the Treadmill was delivered to Sgt. Whitefield, he told Cathy that he would pay Ken at work the $500 owed. It is reported that Cathy Everingham told Sgt. Whitefield to never give Ken cash, that it must be in a personal check form.

Sgt. Whitefield stated that he considers Ken Everingham a good friend and a good cop. It is believed by Sgt. Whitefield that Everingham was given bad advice by some others within the Sheriff's Department.

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Open, pending additional investigation.

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	SUPPLEMENTARY DATE	FILE CLASS
	Tue. Sep. 14, 1999	50000
INCIDENT STATUS		
Open		

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

None.

INTERVIEW OAKLAND COSD DEP. GARY MCCLURE:

On September 13, 1999 at approximately 3:00PM, the undersigned officer met with and interviewed Deputy Gary McClure at the Big Boy Restaurant located on Dixie Hwy., Clarkston, MI. The undersigned was requested to interview Deputy McClure by Ken Everingham, who advised that Gary McClure wanted to talk with the undersigned and could provide additional information to support Everingham and his allegations.

Deputy McClure (off duty) informed the undersigned that he has been employed as a Deputy for over 12 years. He started as a Deputy I working in the Jail, then was promoted to Deputy II and worked the road. In 1994 and 1995, he was assigned for 16 months to N.E.T. While at NET, Deputy McClure was involved in a Motor Vehicle accident with his assigned county vehicle and was transferred back to the jail. Since that time Deputy McClure advised that he has had numerous assignments and is

currently assigned as a Road Deputy at the Independence Twp. Sub Station.

Deputy McClure stated that in 1994 when he was assigned to NET he was originally trained by Deputy Gary Miller. It was Deputy Miller that told McClure to add information to the search warrants to flower them up, i.e. information such as observations on surveillance. Miller reportedly told Deputy McClure that judges expect police officers to lie. Deputy Gary McClure stated that while he worked at NET, he observed on numerous occasions poor and seedy police work done by both Miller, Sgt. Ken Quisenberry and Auburn Hills Police Office Steve Grouwen. Deputy McClure stated that he took the seedy police work and the information on flowering up search warrants to Sgt. Mike Searing. Searing during a unit meeting advised all to only report on Search warrants the true facts of each case and no flowering up the information. Gary McClure further stated that at first he tried to become friends with Miller and Ken Quisenberry but he (McClure) was too straight and could not become seedy like the others. Deputy McClure informed that undersigned that on one occasion he was assisting at a search warrant where money was found late in the search in a safe in the master bedroom. Its reported that Deputy Gary Miller took this money and gave $50 cash to Deputy McClure and stated "the return is completed, go ahead and keep it, nobody will ever know". Deputy McClure stated that he took the fifty-dollar bill and without anyone else knowing placed it back in the safe.

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Deputy Gary McClure advised the undersigned that Deputy Gary Miller was involved in a Motor Vehicle Accident with his assigned County Vehicle. Its [sic] reported by Dep. McClure that Dep. Miller did not report this accident for three (3) months and never reported the real damage or how the accident occurred. Deputy McClure stated that he took all the information to Capt. Mike McCabe of the Oakland County Sheriff's Department. Capt. McCabe assigned the investigation to D/Sgt. Bill Harvey, but the investigation was shabby at best and nothing ever became of the investigation. Deputy McClure felt betrayed by the Sheriff's Department, so he took the information to the Oakland County Prosecutors Office, APA James Halushka. At first Halushka seemed interested but this fizzled out and was covered up by Halushka.

Deputy McClure further advised that because of his actions of bringing this information forward, he feels that he was a target of harassment and retaliation from the Sheriff's Department so McClure reports that he looked into a Whistle Blowers Lawsuit against the Sheriff's Department. McClure stated that he was turned down by the Union because the possible lawsuit included other members of the union. Deputy McClure stated that he hired Attorney Lucy Franco and filed a Whistle Blowers Lawsuit. This Lawsuit was dismissed by Judge Jessica

Cooper of the Oakland County Circuit Court and is now under appeal by Deputy McClure.

The undersigned informed Deputy Gary McClure that the purpose of this investigation is not to reopen any investigation involving his concerns with the Sheriff's Department. The purpose of this investigation is to investigate the allegations made by Ken Everingham involving the Search Warrants and investigation involving Suspect Joe Puertas and allegations of misconduct within the Sheriff's Department. At this time Deputy McClure stated that he had nothing to do with the Puertas Investigation and was not involved with any part of the investigation including execution of search warrants. Deputy McClure further stated that he was not involved with any aspect of the internal investigation on Ken Everingham. Deputy McClure also stated that he did not even know Everingham until recently.

Deputy Gary McClure stated that shortly after his Whistle Blowers Lawsuit, he was subpoenaed by the Defense Attorneys for Joseph Puertas for Disposition. Dep. McClure stated that he gave three (3) days worth of testimony at the deposition mostly centered on the work history and habits of Ken Quisenberry, Gary Miller and Steve Grouwen. Deputy McClure also stated that he is aware of an internal investigation on Ken Quisenberry. Its reported that this investigation was terminated because of all the dirt it was turning up and investigator Bill Harvey was ordered to stop the investigation.

STATUS:

Open, pending additional information.

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Tue. Sep. 23, 1999	50000

INCIDENT STATUS
Closed

POSSIBLE PUBLIC CORRUPTION

JOURNAL:

None

ADDITIONAL INFORMATION:

On Friday, September 17, 1999, the undersigned officer met with and reviewed the entire case investigation with Capt. Christopher Hogan, SECID. On Monday, September 20, 1999, the undersigned met with and again reviewed the entire case. Also on September 20, the undersigned via telephone reviewed the case investigation with Assistant Oakland County Prosecutor James Halushka. All allegations brought by Former Deputy Ken Everingham were unfounded and were not able to be supported with facts.

SUMMARY:

Allegations brought by former Oakland County Sheriff Deputy Ken Everingham concerning the search warrants on the Joseph Puertas Investigation were **unfounded**. Everingham was not able to produce any evidence, documents or support to the allegations he has made against the case investigation.

Everingham also made allegations of misconduct within the command of the Oakland County Sheriff's Department. Everingham claims that he notified his supervisors of the trips to Canada in his County assigned Vehicle. Everingham also claims that he reported to his supervisor that he lost his issued departmental firearm.

Both of these claims are also **unfounded**. Everingham was stopped at the border and talked once by a cousin (border patrol officer of Sgt. Jim Ahearn of the Sheriff's Department. Everingham felt that this was notification to Sgt. Ahearn that he was crossing the border with his County vehicle. Sgt. Ahearn advised that he has not discussed this ever with his cousin Ken Everingham. Sgt. Ahearn also advised that he sees this cousin only once or twice a year.

Everingham also stated that he was involved in a conversation with fellow officers in the FAT office once and the topic of his missing gun surfaced. Everingham claims that Sgt. Whitefield overheard the conversation and was aware that the weapon was missing. Sgt. Whitefield stated that he did overhear the conversation and questioned Everingham about the missing gun and it was Everingham that down played it and said that it was just misplaced at the time. Sgt. Whitefield also stated that later when Everingham lost his Cellular Phone, he was writing a lost equipment report for the Cellular phone and Sgt. Whitefield ordered Everingham to include the missing Firearm (Everingham did not). Sgt. Whitefield stated that Everingham never report the missing firearm officially as required. **Unfounded.**

PAGE	INVESTIGATED BY	REPORTED BY	REVIEWED BY
1 of 2	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

Michigan Department of State Police
SUPPLEMENTAL INCIDENT
REPORT 0008

ORIGINAL DATE	INCIDENT NO.
Tue. Jun. 29, 1999	COC-0000046-99
SUPPLEMENTARY DATE	FILE CLASS
Tue. Sep. 23, 1999	50000

STATUS:

Closed, unfounded allegations.

PAGE	INVESTIGATED BY	REPORTED BY	REVIEWED BY
2 of 2	D/Lt Carl John Maier Jr. #160	/s/ CJ Maier Jr.	/s/ CJM

No. 06-450

In The

Supreme Court of the United States

JOSEPH EDMUND PUERTAS,
Petitioner,

v.

PATRICIA CARUSO, Director Michigan Department Of Corrections, NICK LUDWICK, Warden, Egeler Reception and Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County, Michigan,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In this federal habeas action, did the Court of Appeals correctly conclude—and in a manner consistent with all the other federal circuit courts of appeals that have addressed this type of claim—that the State appellate court's application of *Brady v Maryland* and its progeny to the complex and detailed facts of this case was neither contrary to nor an unreasonable application of clearly established federal law as determined by this Court?

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JURISDICTION

Petitioner, a person in State custody, commenced this action in the United States District Court for the Eastern District of Michigan, pursuant to 28 USC § 2254, by filing a petition for writ of habeas corpus on June 23, 2003. The district court issued an opinion and order that denied the petition on October 19, 2004, and issued a certificate of appealability on all issues raised in the petition. (Appendix to Petition, page 69a) Petitioner filed a notice of appeal pursuant to 28 USC § 2253. On February 13, 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of the writ in an unpublished opinion authored by Judge Sutton and joined by Judge Merritt. In a dissenting opinion, Judge Moore stated that she would grant a writ of habeas corpus. (Appendix to Petition page 1a) Petitioner filed a petition for rehearing and rehearing en banc. In response to the petition, the Sixth Circuit panel issued an amended unpublished opinion again affirming the district court's denial of the writ (with Judge Moore again dissenting). The Court of Appeals gave Petitioner the opportunity to amend his petition for rehearing and rehearing en banc in response to the amended unpublished opinion. Petitioner did so and, in an order dated July 13, 2006, the Court of Appeals denied the petition for rehearing en banc as no judge of that Court requested a vote on the petition and the original panel denied the petition for rehearing (Judge Moore would have granted rehearing for the reasons stated in her dissent). (Appendix to Petition, page 118a)

Petitioner subsequently filed a petition for a writ of certiorari in this Court. On November 20, 2006, this Court requested that Respondents file a brief in opposition to the above petition. This Court has jurisdiction to determine the issues raised in the petition pursuant to 28 USC § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 USC § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 USC § 2254 (e)(1) provides:

> In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to judgment of the State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

COUNTER STATEMENT OF FACTS

Joseph E. Puertas, hereinafter referred to as Petitioner, and James M. Talley were charged with criminal offenses under Michigan State law as a result of their involvement in the distribution of cocaine between August and December of 1997. Petitioner was convicted following a jury trial before the Honorable Colleen O'Brien of the Oakland County Circuit Court in the State of Michigan of one count of conducting a criminal enterprise (racketeering), and six counts of delivery of less than 50 grams of cocaine (second offense). Petitioner was charged as a controlled substance second offender due to a prior conviction for drug dealing. The trial court sentenced Petitioner in December of 1999 to six terms of two to forty years incarceration and one term of two to twenty years incarceration, with all sentences to be served consecutively.

The Michigan Court of Appeals accurately and succinctly summarized the underlying trial facts of this case as follows:

> On August 7, 1997, the Oakland County Sheriff's Department raided the home of Jimmy Sweeney, seized cocaine, money and guns, and arrested Jimmy Sweeney and his brother, Joseph Sweeney. Joseph Sweeney cooperated with the arresting officers and pledged to do whatever it would take to ensure that Jimmy would not face drug charges, including working with police to buy illegal narcotics as part of an undercover investigation (controlled buys). Joseph Sweeney (Sweeney) successfully completed two controlled buys in Pontiac and was advised that he had "worked off" his brother Jimmy's drug charges.[2]
>
> Thereafter, Sergeant Ken Quisenberry of the Oakland County Sheriff's Department, who was then assigned to the Narcotics Enforcement Team (NET),[3] asked Sweeney to serve as a paid informant.[4] Detective Sergeant Gary Miller of the Oakland County Sheriff's Department and Sgt. Quisenberry discussed with

Sweeney drug trafficking in Oakland County. Sergeant Miller mentioned [Petitioner] and advised Sweeney that Puertas was dealing narcotics out of his business, the Megabowl bowling alley. Sweeney offered to try to buy cocaine from Puertas at the Megabowl.

The prosecution maintain[ed] that between August 10 and August 30, 1997, Sweeney successfully completed four controlled buys of cocaine from [Petitioner], [James] Talley [Petitioner's co-defendant] or both. The amount of cocaine ranged between one-quarter and three-quarter ounces per buy. Sgt. Quisenberry and Sweeney testified that Sweeney was searched to ensure that he had no drugs or money on his person before each buy was attempted. Sweeney was followed from the time he was given the money to purchase the drugs until he turned over any evidence of a drug purchase. For each transaction after the initial controlled buy, Sgt. Quisenberry had one or more officers inside the Megabowl whose duty it was to observe Sweeney upon his entry into the Megabowl. For two of these four controlled buys, the sole surveillance officer assigned to observe the transactions within the Megabowl was Oakland County Deputy Sheriff Kenneth Everingham. On one other occasion, Deputy Everingham was assigned surveillance with another member of the Oakland County Sheriff's Department, Sergeant Chris Yuchasz.

Between August 31 and September 24, 1997, Sgt. Quisenberry, through Sweeney, attempted five or six additional controlled buys without success. On September 25, 1997, Sweeney successfully completed a fifth controlled buy. This time, Sgt. Quisenberry personally drove Sweeney to the Megabowl, followed Sweeney into the Megabowl and joined Sgt. Yuchasz to conduct surveillance from within the Megabowl.[5]

Sweeney successfully completed a sixth controlled buy on November 19, 1997. Again, Sgt. Quisenberry followed Sweeney into the Megabowl and joined two other officers to conduct surveillance of the interaction between Sweeney and [Petitioner]. This transaction yielded two "coin envelopes containing cocaine."

After the November 18 transaction, Sgt. Quisenberry sought and obtained search warrants to search the Megabowl and other locations where defendants were observed during the investigation. Search warrants were issued for twelve different locations and, on December 16, 1997, the warrants were executed. The search involved approximately 110 investigators and two dogs purportedly trained to alert to the scent of certain illegal narcotics. The two dogs alerted to nine different safes, although no drugs were found in any of these safes. The officers in charge of the dogs testified that their dogs would alert to the trace odor that lingers even after drugs have been removed from a place. Subsequent to the search, the Oakland County Prosecutor filed a forfeiture action against the Megabowl and almost two million dollars in cash and property seized during this raid.[6]

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[2] Neither Jimmy Sweeney nor Joseph Sweeney was ever charged with any crime arising out of the August 7, 1997 raid of Jimmy's house.

[3] The NET was described at trial as a Michigan State Police coordinated program that brought together officers from eight different law enforcement agencies in Oakland County.

[4] Sweeney was paid from $40 to $150 for participating in each successful controlled buy involving defendants.

[5] Sgt. Quisenberry followed Sweeney out of the Megabowl. Sgt. Quisenberry was surprised when Sweeney produced one-quarter ounce of cocaine

> because, from what Sgt. Quisenberry was able to observe, it did not appear that a transaction took place.
> [6] See *In re Forfeiture of $1,923,235,* 247 Mich App 547; 637 NW2d 247 (2001).

[Sixth Circuit Joint Appendix Vol. I, pages 90-91]

Contemporaneous with criminal charges being filed against Petitioner, the Oakland County Prosecutor initiated civil forfeiture proceedings against assets belonging to Petitioner, members of his family, and some of his business associates. Petitioner was represented in the civil forfeiture proceedings at all times relevant for purposes of this habeas proceeding by the same attorney who represented him in the criminal matter.

Prior to the start of Petitioner's criminal trial, his attorney participated in a series of depositions in the civil forfeiture matter, including depositions of the lead investigating officer in the criminal matter, the informant, and Deputy Kenneth Everingham, who had left the Oakland County Sheriff's Office after the investigation in this case had concluded, and was now claiming, contrary to his preliminary examination testimony, that he had not in fact conducted surveillance during some of the controlled buys at the Megabowl. He also made allegations of unrelated misconduct in the Oakland County Sheriff's Office. In addition, depositions were conducted of a number of police officers (including some who had not been involved in the investigation involving Petitioner), a number of whom expressed negative opinions about how the investigation into the criminal matter had been conducted or opined based on their experience how the investigation should have been conducted.

Approximately four months before Petitioner's criminal trial began, local media reported that the Michigan State Police had initiated a public corruption investigation into Kenneth Everingham's allegations of misconduct in the Oakland County Sheriff's Office (only some of which involved the investigation of Petitioner). One newspaper article quoted Petitioner's

attorney discussing Everingham's allegations of misconduct by the Oakland County Sheriff's Office in the investigation into Petitioner's criminal wrongdoing.

The Michigan State Police public corruption investigation concluded approximately two weeks before Petitioner's criminal trial began. The investigator for the Michigan State Police found that all of Everingham's allegations of misconduct in the Oakland County Sheriff's Office regarding the investigation into Petitioner's criminal wrongdoing as well as unrelated matters of misconduct within the Sheriff's Office were unfounded.

Petitioner's criminal trial began in October of 1999. Although Petitioner's attorney indicated during his opening statement to the jury that Kenneth Everingham would be a witness for the defense, the defense ultimately chose not to call him to the stand. The jury found Petitioner guilty as charged.

After the jury convicted Petitioner, but before his sentencing, the Detroit Free Press—a local newspaper—obtained a partial copy of the report that had been generated by the Michigan State Police during its public corruption investigation.

The Detroit Free Press provided the Oakland County Prosecutor (and, apparently, Petitioner's attorney as well) with two pages of the public corruption investigation report on November 9, 1999, some eight days after the verdict in this case. Before the trial court ruled on Petitioner's first motion for new trial, an additional 13 pages of the report had surfaced with some of the materials on the pages having been redacted.

Petitioner sought a new trial before the trial court prior to his sentencing. The trial court denied this motion for new trial. It then proceeded to sentence Petitioner.

After sentencing, Petitioner's appellate attorney filed a motion for discovery in the trial court seeking an order to

compel the Oakland County Prosecutor to turn over the entire Michigan State Police public corruption investigation report to the defense. The Oakland County Prosecutor responded that he had no more of the report than had been provided to the defense, but added that he would not object to an order compelling the Michigan State Police to turn over a full un-redacted copy of the report to the trial court so that it could conduct an in-camera review to decide whether the entire report should be released to the parties. The trial court signed a stipulated order on February 16, 2000.

After conducting the in-camera review, the trial court granted Petitioner's motion for discovery in an opinion and order entered on March 27, 2000. It found that Petitioner was entitled to a full copy of the report based on an "Order Granting Motion for Additional Discovery," that had been entered on June 10, 1998, by its predecessor judge, the Honorable J.P. Jourdan, requiring the prosecution to provide to the defense, "[a]ny and all statements of interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial . . . whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies."

Subsequently, pursuant to the trial court's order, the Michigan State Police released a full un-redacted copy of its public corruption investigation report to Petitioner's attorney and the Oakland County Prosecutor.[1] On April 3, 2000,

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[1] The assertion by Petitioner that "[t]he prosecution, upon being ordered to do so, turned over a copy [of the Michigan State Police public corruption investigation report] to the defense" (Petition, page 7), is inaccurate and misleading in that it gives the impression that the report had always in the possession of the prosecutor or the Oakland County Sheriff's Office (the agency largely responsible for the investigation of Petitioner's criminal wrongdoing and the subject of the public corruption investigation) —an allegation that both the Michigan Court of Appeals and the federal district court found to be untrue. (Sixth Circuit Joint Appendix, Vol. I, page 94; Appendix to Petition, page 84)

Petitioner filed a second motion for new trial and request for order of dismissal.

In an opinion and order entered on May 8, 2000, the trial court granted Petitioner's motion for new trial. (Appendix to Petition, page 112a)

The Oakland County Prosecutor filed an appeal in the Michigan Court of Appeals from this opinion and order. In an unpublished opinion, dated September 27, 2002, the Michigan Court of Appeals reversed the trial judge's order granting Petitioner a new trial. (Sixth Circuit Joint Appendix, page 89) The Court also addressed additional claims of error raised by Petitioner in his appeal and found that Petitioner was not entitled to a new trial.

Petitioner then sought leave to appeal from this opinion per curiam in the Michigan Supreme Court. In an order dated May 22, 2003, the Michigan Supreme Court unanimously denied Petitioner's application for leave to appeal.[2] Petitioner filed a motion for reconsideration in the Michigan Supreme Court. The Michigan Supreme Court denied the motion in an order dated October 24, 2003.[3]

This federal habeas action and the appeal therefrom followed.

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[2] *People v Puertas*, 661 NW2d 583 (Mich, 2003).

[3] *People v Puertas*, 670 NW2d 670 (Mich, 2003).

ARGUMENT

In this federal habeas action, the Court of Appeals correctly concluded—consistent with all other federal circuits that have addressed this type of claim—that the State appellate court's application of *Brady v Maryland* and its progeny to the facts of this case was neither contrary to nor an unreasonable application of clearly established federal law as determined by this Court.

The Michigan appellate courts rejected Petitioner's claim that the Oakland County Prosecutor had violated *Brady v Maryland*[4] by "failing" to turn over a report concerning an investigation conducted by the Michigan State Police of allegations of public corruption in the Oakland County Sheriff's Office.

The Court of Appeals in its unpublished opinion and the district court determined that the State courts' decision was neither contrary to nor an unreasonable application of *Brady* and its progeny. The Court of Appeals and the district court correctly did so.

In order to demonstrate a *Brady* violation, all three prongs of the following test must be met: (1) "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching," (2) "that evidence must have been suppressed by the State, either willfully or inadvertently," and (3) "prejudice must have ensued."[5]

Petitioner claims that the Court of Appeals relieved the prosecutor's burden under *Brady* to disclose exculpatory and impeaching material to the defense and imposed a duty on the defense to search for and discover exculpatory and impeaching material. He also claims that Court of Appeals used the

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[4] *Brady v Maryland*, 373 US 83 (1963).

[5] *Strickler v Greene*, 527 US 263, 281-282 (1999).

"wrong standard" to judge the materiality of the purported *Brady* material. (Petition, page 5) Both of Petitioner's claims are without merit.

As stated in great detail by both the Court of Appeals and the district court, the defense had actual knowledge well in advance of trial of most of the pertinent information contained in the Michigan State Police public corruption investigation report (i.e. through depositions of many of the individuals interviewed during the public corruption investigation conducted during the related civil forfeiture matter).

As for the remainder of the pertinent information, both the Court of Appeals and the district court found (as did the Michigan Court of Appeals) that Petitioner had been made aware that such information potentially existed from the depositions in the civil forfeiture matter and through allegations that were made public in the local media and that he failed to make reasonable efforts to secure the information on his own, and thereby refused to characterize the information as *Brady* material.[6]

Petitioner apparently believes that a broad and non-specific discovery order (quoted in the Petition at page 9) entered by the trial court more than a year before the conclusion of the Michigan State Police public corruption investigation was as much diligence or effort as he should have been required to exercise to compel the prosecution to turn over the report generated by Michigan State Police—a report that was in fact neither in the possession of the prosecution nor in the possession of the agency investigating Petitioner's crimes.[7] He further believes that the Court of Appeals' finding that he

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[6] In support of this legal principal, the Court of Appeals cited *Coe v Bell*, 161 F3d 320 (CA 6, 1998), and *Spirko v Mitchell*, 368 F3d 603 (CA 6, 2004).

[7] See the discussion of this point in the district court's opinion (Appendix to Petition, pages 85a-86a) and the Michigan Court of Appeals' opinion (Sixth Circuit Joint Appendix, Vol. I, page 94).

should have made more of an effort to obtain a copy of the investigation report conflicts with holdings of this Court and the United States Court of Appeals for the Ninth Circuit.

The finding of the Court of Appeals on this point is a reasonable application of precedent from this Court. This Court has described the *Brady* rule as applying to information known to the prosecution, but "unknown to the defense."[8] It logically follows from this precedent that material the defense can be expected to discover or should be able to discover on its own should not be characterized as *Brady* material. Further, contrary to Petitioner's claim, this logical inference is not inconsistent with this Court's holdings in *Strickler* and *Banks v Dretke.*[9]

This Court in *Strickler* did not reach the precise question at hand stating: "We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them."[10] However, language in *Strickler* indicates that there could be circumstances where a defendant would have a basis beyond mere speculation or mere suspicion for believing that additional exculpatory or impeaching information existed so that he would be required to do more than simply rely on *Brady.*[11]

This Court in *Banks* likewise did not reach the precise question at hand. However, citing *Strickler,* this Court did not foreclose the possibility of situations arising where a defendant might be expected to exercise some diligence when serendipitously or otherwise discovering hints that additional

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[8] *Kyles v Whitley,* 514 US 419, 437 (1995). See also *United States v Bagley,* 473 US 667, 678 (1976) (Opinion of Blackmun, J); *United States v Agurs,* 427 US 97, 103 (1976).

[9] *Banks v Dretke,* 540 US 668 (2004).

[10] *Strickler,* 527 US at 288 n 33.

[11] See *Strickler,* 527 US at 286, 287.

exculpatory or impeaching information may exist. The Court merely stated that a defendant is not expected to blindly "scavenge" for such "hints of undisclosed *Brady* materials."[12]

Further, Petitioner claims that the position taken by the Court of Appeals in this regard is in conflict with the position taken by the Ninth Circuit. However, the two case authorities from the Ninth Circuit cases cited by Petitioner, *i.e.*, *Benn v Lambert,*[13] and *Paradis v Arave,*[14] are not relevant to the position taken by the Court of Appeals in this case.

In both *Benn* and *Paradis,* the prosecution provided the defense with the names of experts and evidence that they held views supporting the prosecution's theory of guilt, but did not disclose evidence that the experts had, at one point, held views which undermined the prosecution's theory of guilt. As such, although in possession of the names of the experts, the defense had no reason to believe the experts at one point had held views undermining the prosecution's theory of guilt. These facts are completely unlike those of the present case, where Petitioner not only knew the names of individuals holding negative views about the proceedings against Petitioner, but deposed many of these individuals at length during the civil forfeiture matter. Petitioner's attorney also knew that the Michigan State Police were conducting a public corruption investigation into allegations of misconduct in the Oakland County Sheriff's Office made by one of these individuals (Kenneth Everingham) whom he deposed in the civil forfeiture matter over the course of three days.

Further, contrary to Petitioner's claim, the Ninth Circuit like the Court of Appeals below has held that "defense diligence" may be required in a *Brady* situation where "the means of obtaining the . . . evidence has been provided to the defense" where the defendant "had within [his] knowledge the

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[12] *Banks,* 540 US at 695.

[13] *Benn v Lambert,* 283 F3d 1040 (CA 9, 2002).

[14] *Paradis v Arave,* 130 F3d 385 (CA 9, 1997).

information by which [he] could have ascertained the supposed *Brady* material." *United States v Dupuy;*[15] *United States v Shelton.*[16]

Moreover, it appears that every federal Circuit that has addressed *Brady* in this kind of situation[17] has, like the Court of Appeals below, required the defense to exercise some degree of diligence or effort beyond merely expecting the prosecution to comply with *Brady* or a general discovery order when it becomes evident that purported *Brady* material may exist.[18] As noted by the Seventh Circuit, "[r]efusing to characterize as *Brady* material information the defense can be expected to discover serves to weed out incredible claims of ignorance, to prevent sandbagging, and is consistent with a focus on actual knowledge."[19]

Petitioner next argues that the Court of Appeals used a test for materiality inconsistent with—and contrary to—this Court's precedent in *Kyles*[20] by concluding that the defense would not have gained "additional help" if it would have had the Michigan State Police public corruption investigation report in its possession prior to trial. Petitioner extrapolates from the language used by the Court of Appeals and its

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[15] *United States v Dupuy,* 760 F2d 1492, 1502 n 5 (CA 9, 1985), quoting from *United States v Griggs,* 713 F2d 672, 674 (CA 11, 1983).

[16] *United States v Shelton,* 588 F2d 1242, 1250 (CA 9, 1978).

[17] It appears that all the Circuit Courts of Appeals have addressed *Brady* in this situation with the possible exception of the United States Court of Appeals for the District of Columbia Circuit.

[18] See e.g. *Lugo v Munoz,* 682 F2d 7, 10 (CA 1, 1982); *United States v Paulino,* 445 F3d 211, 225 (CA 2, 2006); *United States v Perdomo,* 929 F2d 967, 973 (CA 3, 1991); *United States v Wilson,* 901 F2d 378, 380 (CA 4, 1990); *Westley v Johnson,* 83 F3d 714, 726 (CA 5, 1996); *United States v Gintjes,* 237 F3d 876, 880 (CA 7, 2001); *Johns v Bowersox,* 203 F3d 538, 545 (CA 8, 2000); *Banks v Reynolds,* 54 F3d 1508, 1517 (CA 10, 1995) (in the context of the materiality—not suppression—prong of *Brady*); *United States v Davis,* 787 F2d 1501, 1505 (CA 11, 1986)

[19] *Boss v Pierce,* 263 F3d 734, 743 (CA 7, 2001).

[20] *Kyles,* 514 US 419.

analysis of the facts that it incorrectly applied a "sufficiency of the evidence" test or "more likely than not" test instead of the materiality test mandated by *Kyles* and *Strickler*. (Petition, page 13) Again, Petitioner is wrong.

The Court of Appeals correctly cited *Strickler* (which itself repeatedly references *Kyles*) as the precedent from this Court by which to analyze Petitioner's *Brady* claim. (Appendix, page 38a) A careful review of Petitioner's discussion of his claim concerning the Court of Appeals on this point reveals that he is merely disagreeing with *how* the Court of Appeals applied this precedent.

Even the dissenting judge in the Court of Appeals does not claim that the majority applied the wrong test for the third (materiality) prong of the test for a *Brady* violation. Rather, she merely claims that the majority added elements of the second (suppression) prong of the test for a *Brady* violation and, like Petitioner, disagrees with the majority's application of the materiality prong of the test for a *Brady* violation to the facts of this case. Petitioner's disagreement with the factual analysis engaged in by the Michigan Court of Appeals, the federal district court, and now the Court of Appeals, is not a compelling reason for this Court to grant Petitioner further review.[21]

Petitioner, a previously convicted drug dealer, was convicted of additional state law drug and racketeering offenses in late 1999 and sentenced to a lengthy term of incarceration. He has spent most of the time since his conviction and sentencing on bond. It is time to end this habeas proceeding and to allow the State of Michigan to take Petitioner into custody so that he can serve the sentence imposed upon him almost seven years ago.

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[21] See 28 USC § 2254 (e)(1).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 2006